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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915
1914

No. [REDACTED] 73

BANNING COMPANY, MARY H. BANNING, LUCY T. GREEN-
LEAF, MARY H. MORRIS, HANCOCK BANNING, AND
PACIFIC ELECTRIC RAILWAY COMPANY, PLAINTIFFS
IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA UPON THE
INFORMATION OF U. S. WEBB, ATTORNEY GENERAL

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY 19, 1914.

(24,061)

(24,061)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 368.

BANNING COMPANY, MARY H. BANNING, LUCY T. GREEN-
LEAF, MARY H. MORRIS, HANCOCK BANNING, AND
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L. A. No. 3057.

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA upon Information of
U. S. WEBB, Attorney General, Plaintiff and Respondent,

vs.

BANNING COMPANY, a Corporation; MARY H. BANNING, LUCY T. Greenleaf, and Mace Greenleaf, Her Husband; Mary H. Norris, Hancock Banning, Pacific Electric Railway Company, a Corporation; Los Angeles Harbor Company, a Corporation; Imperial Investment Company, a Corporation; John Doe, and Richard Roe, Defendants and Appellants.

Appeal from the Superior Court of Los Angeles Co.

Hon. Walter Bordwell, Judge.

Transcript on Appeal.

J. W. McKinley, Frank Karr, Gibson, Dunn & Crutcher, Ward Chapman, Lloyd W. Moultrie, Attorneys for Defendants and Appellants.

U. S. Webb, Attorney General; Anderson & Anderson, Leslie R. Hewitt, John W. Shenk, A. P. Fleming, Attorneys for Plaintiff and Respondent.

Filed Oct. 20, 1911. B. Grant Taylor, Clerk, by ———, Deputy.

5 In the Superior Court of the State of California in and for the County of Los Angeles.

No. 64536.

THE PEOPLE OF THE STATE OF CALIFORNIA upon Information of
U. S. WEBB, Attorney General, Plaintiff,

vs.

BANNING COMPANY, a Corporation; MARY H. BANNING, LUCY T. Greenleaf, and Mace Greenleaf, Her Husband; Mary H. Norris, Hancock Banning, Pacific Electric Railway Company, a Corporation; Los Angeles Harbor Company, a Corporation; Imperial Investment Company, a Corporation; John Doe, and Richard Roe, Defendants.

Amended Complaint.

The plaintiffs herein, upon the information of U. S. Webb, attorney general of said state, and by leave of court first had and obtained, file this their amended complaint herein and say:

I.

6 That each of the corporations defendant, to wit, Banning Company, Pacific Electric Railway Company, Los Angeles Harbor Company and Imperial Investment Company, is a corporation organized and existing under and by virtue of the laws of the state of California, having its principal place of business in the county of Los Angeles, state of California.

II.

That each of the corporation- defendant, to wit, Banning its boundaries and now embraces that certain navigable bay known as Wilmington bay or the inner bay of San Pedro, being an inlet of the Pacific ocean, and said bay, its arms, estuaries and channels were then and at all times since have been and are now navigable waters of this state and of the United States, and used for purposes of navigation.

III.

That the state of California is the owner of that certain parcel of land particularly described as follows, to wit:

Location No. 57, state tide lands, Los Angeles county, township No. 5 south, range No. 13 west, San Bernardino meridian. sections 5, 6 and 7 (parts of), viz., described in the field notes of said location as follows:

Beginning at a point called "Las Bariles" or Barrel Springs," said point being 27.73 chains south and 41.88 chains east of the section corner to sections 1 and 6 on first standard parallel south
7 of San Bernardino base line, township 5 south, ranges 13 and 14 west, and running thence

S. 61° W. 11 chains; thence
S. $22\frac{1}{2}^{\circ}$ W. 11.58 chains; thence
S. 14° E. 2.40 chains; thence
N. $62\frac{1}{2}^{\circ}$ E. 1.41 chains; thence
S. 20° E. 3 chains; thence
S. 63° E. 1.50 chains; thence
S. $23\frac{1}{2}^{\circ}$ E. 1.50 chains; thence
S. 16° W. 4 chains; thence
N. 78° E. 2.65 chains; thence
S. 43° E. 1.20 chains; thence
S. 19° E. 1.50 chains; thence
S. $14\frac{1}{2}^{\circ}$ E. 3 chains; thence
S. $52\frac{1}{2}^{\circ}$ E. 1.51 chains; thence
S. 4° E. 2 chains; thence
S. 12° W. 4.50 chains; thence
N. 63° E. 3.15 chains; thence
S. 11° E. 4.85 chains; thence
S. 9° W. 8.70 chains; thence
S. 19° W. 3.75 chains; thence
S. $28\frac{1}{2}^{\circ}$ W. 4.50 chains; thence
S. 46° W. 8.16 chains; thence

S. 43° W. 6.50 chains; thence
 No. 70° W. 70 chains; thence
 S. 10° W. 3.60 chains; thence
 W. 2.50 chains; thence
 S. $5\frac{1}{2}^{\circ}$ W. 1.81 chains; thence
 S. $76\frac{1}{2}^{\circ}$ W. 3 chains; thence
 S. 24° E. 2.87 chains; thence
 8 S. $44\frac{1}{2}^{\circ}$ W. 6.27 chains; thence
 N. 70° W. 3.70 chains; thence
 N. $62\frac{1}{4}^{\circ}$ W. 7.50 chains; thence
 S. 72° W. 4.55 chains to township line between ranges 13 and 14
 W., T'wp 5 S., at a point 17.88 chains south of the corner common
 to sections 1 and 12 of range 14 west, and sections 6 and 7 of range
 13 west, all of township 5 south; thence
 S. 22.56 chains; thence
 N. 58° .08' E. 125.57 chains; thence
 N. 75° 50' E. 40.91 chains; thence
 N. 29.33 chains; thence
 S. $56\frac{1}{2}^{\circ}$ W. 9 chains; thence
 S. 21° W. 5.04 chains; thence
 S. $47\frac{1}{2}^{\circ}$ W. 6.38 chains; thence
 S. $13\frac{1}{2}^{\circ}$ W. 12.21 chains; thence
 S. 71° W. 2.48 chains; thence
 N. $67\frac{1}{4}^{\circ}$ W. 17 chains; thence
 N. $72\frac{3}{4}^{\circ}$ W. 15.75 chains; thence
 N. 11° E. 5.50 chains; thence
 No. $65\frac{1}{4}^{\circ}$ W. 7 chains; thence
 S. $77\frac{1}{4}^{\circ}$ W. 32 chains; thence
 N. $77\frac{3}{4}^{\circ}$ W. 10.46 chains; thence
 S. 86° W. 7.30 chains to the place of beginning, containing 431.13
 acres.

IV.

That said land is, and at all times has been, a portion of the bed
 of said inner bay of San Pedro, and the whole of said land now
 lies and has always been below the line of ordinary high tide
 9 in said bay, and said land lies partly within the limits of
 the city of San Pedro and partly within the limits of the
 city of Wilmington, and the whole of said land at all times since
 prior to 1870 has been within two miles of the cities or towns of
 San Pedro and Wilmington; and that no portion of said land is now
 or ever has been reclaimable for agricultural or other purposes.
 That said land has at all times been withheld from sale by the state
 of California.

V.

The defendants and each of them claim some estate or interest
 in said land, adverse to plaintiffs, and plaintiffs are informed and
 believe, and upon such information and belief allege that all of
 the defendants assert a claim to said land under an alleged common
 source of title, to wit, under a pretended state patent purporting to

have been issued to Phineas Banning; that said pretended patent is dated December 13, 1880, and was based upon and issued in pursuance of a pretended certificate of purchase of said land as "tide lands," dated October 10, 1880, purporting to have been issued to Phineas Banning under the authority of the laws of this state providing for the sale of swamp, overflowed, salt-marsh and tide lands; and plaintiffs further allege that all claims of defendants to said lands, or any part thereof, are and the claim of each of them is, invalid and without right.

10

VI.

That the true names of the defendants John Doe and Richard Roe are unknown to plaintiffs and for that reason they are sued herein by said fictitious names, and leave of court is asked to insert their true names when the same are ascertained.

Wherefore, plaintiffs pray that defendants be required to set forth the exact nature of their claims; that the title of the state of California to said land be decreed to be valid, and that the claims of the defendants and each of them be adjudged to be invalid, and without any right whatever, and for general relief and costs of suit.

U. S. WEBB,

Attorney General of California.

ANDERSON & ANDERSON,

A. P. FLEMING,

Attorneys for Plaintiffs.

LESLIE R. HEWITT,

City Attorney of Los Angeles, of Counsel.

Endorsed: Received copy of the within amended comp. this 28th day of November, 1908. Ward Chapman for Mary Banning & Mace Greenleaf. Filed Nov. 28, 1908. C. G. Keyes, clerk, by L. E. Lampton, deputy.

11

[Title of Court and Cause.]

Demurrer of Banning Co. et al. to Amended Complaint.

Now come Banning Company, a corporation, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, a corporation, and severing from their co-defendants, in the above entitled action, and without waiving their motion to dismiss said action, notice of which was heretofore served, demur to plaintiff's amended complaint herein, upon the following grounds, to wit:

I.

That said amended complaint does not state facts sufficient to constitute any cause of action against said defendants or either of them.

II.

That said amended complaint is uncertain in the following particulars:

1. That it cannot be ascertained from said amended complaint what navigable waters in Wilmington bay or in the bay of San Pedro, referred to in said amended complaint, existed on September 9th, 1850, or at any other time, or where the boundaries of said navigable waters were then or at any time since said date, fixed, located or established, nor can it be ascertained what tide or tides, is or are recorded as fixing the lines or boundaries of any navigable waters on September 9th, 1850, or at any other time.

12 3. That it cannot be ascertained from said amended complaint what land, or tide lands, referred to in the said amended complaint, the state of California is the owner of.

4. That it cannot be ascertained from said amended complaint, what lands referred to in said complaint at all times or any time has been a portion of the said inner bay of San Pedro, or what portion of said lands lies or has always been below the line of ordinary high tide in said bay, or what land lies partly within the limits of the city of San Pedro, or partly within the limits of the city of Wilmington, or whether the whole or what portion of said land at any time or at all times since prior to 1870, has been within two miles of the cities or towns of San Pedro and Wilmington or either of them, or when either of said towns was incorporated, founded or established, or what lands or portions of lands has at all times or any times been withheld from sale by the state of California.

5. That it cannot be ascertained from said amended complaint where the shore lines or tide lines or boundaries of navigable waters, if any, are or were at any time fixed or located or established upon, with reference to the lands particularly described in paragraph III of said amended complaint.

6. That it cannot be ascertained from said complaint what
13 portion or portions of the lands referred to therein, is claimed by the several or any defendants in said action.

7. That it cannot be ascertained from said amended complaint for what reason or why the state patent referred to in paragraph V of said amended complaint is alleged to be a pretended state patent, or why the certificate of purchase referred to in said paragraph V of said amended complaint is alleged to be a pretended certificate of purchase of said land; nor can it be ascertained under what authority referred to in said paragraph V of said amended complaint, said patent and said certificate of purchase or either of them were issued. Nor can it — ascertained from said amended complaint upon what grounds or for what reason the claims of defendants to said land or any of them, are invalid or without right.

8. That it cannot be ascertained from said amended complaint by what authority or for what reason or upon what ground plaintiffs in said action, are seeking to attack and render invalid, or of no effect, the patent and certificate of purchase to the land therein referred to and issued by the state of California, and grant of land thereby made.

III.

That said amended complaint is ambiguous for each and all of the reasons hereinbefore stated, as grounds of uncertainty.

14

IV.

That plaintiffs have no legal capacity to sue, in that it does not appear in said amended complaint by what power or authority the attorney general of this state, upon his own information, or the People of the state of California seek in this action to annul or set aside or render of no effect the patents and grants of land issued and made by the state of California, referred to in said amended complaint.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for said Defendants.

Endorsed: Received copy of the within demurrer this 9th day of December, 1908. Anderson & Anderson, attorney for plaintiff. Filed Dec. 9, 1908. C. G. Keyes, clerk; by A. W. Francisco, deputy. Apr. 22, 1909. Demurrer overruled. 30 days to answer. Attest: C. G. Keyes, clerk; by Geo. O. Monroe, deputy.

[Title of Court and Cause.]

Demurrer of Los Angeles Harbor Co. and Imperial Investment Co. to Amended Complaint.

Comes now the Los Angeles Harbor Company, a corporation, and the Imperial Investment Company, a corporation, defendants
15 in the above entitled action, and severing from their co-defendants herein, and without waiving their motion heretofore made to dismiss the above entitled action as against these defendants but expressly reserving the same and their right to have said motion heard and determined by this court, said defendants demur to plaintiff's amended complaint and for ground of demurrer allege:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them.

II.

That the plaintiff has not legal capacity to sue in that it does not appear in said complaint by what power or authority the attorney general of said state, upon his own information, or the people of the state of California, seek in this action to annul or set aside or render of no effect the estate and claim of these defendants in and to the land described in plaintiff's complaint.

III.

That said complaint is ambiguous in the following particulars and for the following reasons:

a. That it cannot be ascertained from said complaint what portions of Wilmington Bay or the inner bay of San Pedro referred to in said complaint are navigable waters or were navigable waters at

the time therein specified, and what portions of said bay were or are tide lands.

16 *b.* That it cannot be ascertained from said complaint whether it is claimed that the tide lands therein referred to form a portion of the bed of said inner bay of San Pedro underlying the navigable waters thereof, or what portion, if any, of the lands therein described as tide lands are under the navigable waters of said bay.

c. That it cannot be ascertained from said complaint where the lands therein described as tide lands were or are located in that certain navigable bay referred to in said complaint.

d. That it cannot be ascertained from said complaint what portions of said bay contain navigable waters and what portions of said bay were or are tide lands or where said tide lands were or are located.

e. That it cannot be ascertained from said complaint where the line of ordinary high tide was or is located, fixed or established.

f. That it cannot be ascertained from said complaint what portions of the land therein described are claimed by the several defendants in this action.

g. That it cannot be ascertained from said complaint why the lands therein referred to are not or were not reclaimable for agricultural or other purposes.

h. That it cannot be ascertained from said complaint in what manner or by what authority said land has been or is withheld from sale by the state of California.

17 *i.* That it cannot be ascertained from said complaint upon what theory or for what reason the alleged pretended state patent issued in pursuance of an alleged pretended certificate of purchase of said lands as tide lands purporting to have been issued under the authority of the laws of the state of California, providing for the sale of swamp, overflowed, salt marsh and tide lands, was or is invalid or without right.

j. That it cannot be ascertained from said complaint by what authority or for what reason or upon what ground plaintiffs in this action are seeking to attack the claim of these defendants or either of them in or to the property described in said complaint.

IV.

That said complaint is uncertain for each and all of the reasons hereinbefore stated as grounds of ambiguity.

Wherefore these defendants pray that plaintiff take nothing by its said amended complaint and that these defendants have judgment for their costs.

LLOYD W. MOULTRIE,

Attorney for said Defendants.

Endorsed: Received copy of the within demurrer this 8th day of December, 1908. Anderson & Anderson, attorney for pl'ff.
18 Filed Dec. 8, 1908. C. G. Keyes, clerk; by L. E. Lampton, deputy. Apr. 22, 1909. Demurrer overruled. 30 days to answer. Attest: C. G. Keyes, clerk; by Geo. O. Monroe, deputy.

[Title of Court and Cause.]

Amendment to Demurrer of Banning Co. et al., to Amended Complaint.

Now come the Banning Company, a corporation, William B. Banning, Joseph B. Banning, Hancock Banning, Pacific Electric Railway Company, a corporation, and the California-Pacific Railway Company, a corporation, defendants in the above entitled action, by leave of court, file this amendment to the amended complaint in said action, by adding thereto the following grounds:

VII.

That the cause of action alleged in plaintiffs' amended complaint is barred by the provisions of section 315 of the Code of Civil Procedure.

VIII.

That the plaintiffs' cause of action in said amended complaint is barred by the provisions of section 318 of the Code of Civil Procedure.

IX.

19 That the plaintiffs' cause of action in said amended complaint is barred by the provisions of section 319 of the Code of Civil Procedure.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for said Defendants.

Endorsed: Filed Jan. 16, 1909. C. G. Keyes, clerk; by Geo. O. Monroe, deputy. Apr. 22, 1909. Demurrer overruled: 30 days to answer. Attest: C. G. Keyes, clerk; by Geo. O. Monroe, deputy.

[Title of Court and Cause.]

Amendment to Amended Complaint.

Come now the plaintiffs and by leave of court first had and obtained file this amendment to their amended complaint by excepting certain lands from the description in said complaint, as follows, to wit: By inserting at the close of paragraph III the following words:

20 "Except 7.2 acres described as follows: Commencing at the southwest corner of a house formerly known as Quartermaster's Barn, and running easterly along the southerly line of said barn and of the quartermaster's shed 272 feet; thence southerly and at right angles to the northern boundary of said quartermaster's barn and adjacent shed 1,120 feet, more or less, to the northern boundary of railroad side as delineated on plat thereof filed in office of the recorder of Los Angeles county and also in the

office of the surveyor general and controller of state; thence westerly along said northerly boundary a little more than 272 feet to the intersection of said northern boundary, or its prolongation with a line drawn from the southwest corner of said quartermaster barn perpendicular to the northern boundary of said barn and adjacent shed; and parallel with the line secondly above described; thence northeasterly along said line last aforesaid and parallel to the eastern boundary to the point of beginning."

Dated June — 1909.

U. S. WEBB,
A. P. FLEMING,
ANDERSON & ANDERSON,
Attorneys for Plaintiffs.

LESLIE R. HEWITT, *City Att'y.*
Of Counsel.

Endorsed: Received copy of the within amendment to am. com., this 1st day of July, 1909. Gibson, Trask, Dunn & Co., attorney for def't. Filed Jul- 1, 1909. C. G. Keyes, clerk; by L. E. Lampton, deputy.

21 [Title of Court and Cause.]

Amended Answer of Mary H. Banning et al. to Amended Complaint.

Now comes the defendants Mary H. Banning, Lucy T. Greenleaf and Mace Greenleaf, and with leave of the court first obtained, and upon the stipulation of the parties filed herein, make the following answer to the amended complaint herein:

I.

They admit that on September 9, 1850, the state of California embraced within its boundaries, and still embraces, a certain bay known as Wilmington bay, or the inner harbor of San Pedro, and admit that the same is an inlet of the Pacific ocean; and admit that some parts of the said bay have been used for purposes of navigation, and contain navigable waters, but as to a very large part of the said bay, these defendants deny that the same has been used for purposes of navigation or that it embraces navigable waters.

II.

They deny that the state of California is the owner of the land described in the third paragraph of the said amended complaint, comprising location No. 57, state tide lands, and deny that the state of California owns any part thereof, but on the contrary
22 these defendants aver that the state of California granted and conveyed the whole of the tract of land therein described by patent of the state, duly executed and delivered, for a valuable consideration received therefor, to the predecessor in interest of the

defendants herein, and said defendants through mesne conveyances have become the owners in fee simple of portions of the said tract of land in separate ownership as follows, to wit:

Mary H. Banning is the owner as aforesaid of the following described tracts:

1st. The following described tract of tide land lying easterly of the depot and railroad tracks of the Southern Pacific railroad:

Commencing at the southeast corner of the 461.13 acre tract of tide land, the same being known as survey No. 4, location No. 57, state tide lands; thence north along the east side of said 461.13 acre tract, 29.33 chains to the northeast corner of said 461.13 acre tract to 4 x 4 post marked M. H. B.; thence following the northerly line of said tract S. 56° 30' W. 7.73 chains to a 4 x 4 post marked M. H. B. and L. B.; thence leaving boundary line of said 461.13 acre tract S. 26.56 chains to a point on the south line of the said 461.13 acre tract; thence north 76° 50' E., 6.62 chains to the point of beginning, and containing eighteen acres, more or less. Saving and excepting therefrom what portion of the above tract is now

occupied as railroad right of way by the Southern Pacific Railroad Company, and being a strip about fifty feet wide off the northerly side of said tract.

2nd. The following described piece of the tide land lying west of the land known as land of Southern California Co-operative Warehouse and Shipping Association, and being a portion of the 461.13 acre tract of tide land location No. 57; commencing at a point on the south line of the 461.13 acre tract, distant south 76° 50' W., 39.93 chains from the southeast corner of said 461.13 acre tract. This point also being on the west line of the land of the Southern California Co-operative Warehouse and Shipping Association; thence north 3° 27' W. along the west side of the above association's land nineteen and ninety-two hundredths (19.92) chains to stake 4 x 4 marked M. H. B., on the northerly line of the 461.13 acre tract above referred to; thence following said northerly line north 72° 45' W. 8.56 chains to a post marked M. H. B. and L. B.; thence south 9° 22' E. across mud flats 25.63 chains to the southerly line of the said 461.13 acre tract; thence following said southerly line north 58° .08' E. 5 chains; thence north 76° 50' E. 98 links to the place of beginning, and containing 15.06 acres, more or less; saving and excepting therefrom the right of way of the Southern Pacific railroad.

24 3rd. The following described piece of tide land, being a portion of the 461.13 acre tract of tide land location No. 57, to wit:

Commencing at the southwest corner of the 461.13 acre tract; said point being on the range line between ranges 13 and 14 west, of San Bernardino Meridian, and distant south 40.44 chains from the southwest corner of section 6, T. 5 S., R. 13 W., S. B. M.; thence following the southerly line of the 461.13 acre tract across mud flats north 58° .08' east, 64.63 chains; thence north 33° 15' W. 31.98 chains to a point in the westerly side of said 461.13 acre tract, a 4 x 4 post marked M. H. B. and L. B.; thence following the meanders

of the outside line of the said 461.13 acre tract S. 4° E. 2 chains; thence south 12° W. 4.50 chains; thence N. 66° E. 3.15 chains; thence S. 11° E. 4.85 chains; thence S. 9° W. 8.70 chains; thence S. 19° W. 3.75 chains; thence S. 28° 30' W. 4.50 chains; thence S. 46° W. 8.16 chains; thence S. 53° W. 6.50 chains; thence N. 78° W. 70 links; thence north 10° W. 3.60 chains; thence west 2.50 chains; thence S. 5° 30' west 1.81 chains; thence S. 76° 30' W. 3 chains; thence S. 24° east 2.87 chains; thence S. 44° 30' west 6.27 chains; thence N. 70° west, 3.70 chains; thence north 62° 15' west, 7.50 chains; thence S. 72° west 4.55 chains to a point on the range line on the west side of section 7; thence S. 22.56 chains to the place of beginning, and containing 82 acres more or less.

Lucy T. Greenleaf is the owner as aforesaid, of the following described tracts:

1st. The following described piece of tide land lying easterly of the Southern Pacific railroad and depot at Wilmington, commencing at a point on the south line of the tide land location No. 57, distant south 76° 50' west, 6.62 chains from the southeast corner of the said tide land location No. 57; thence north along the line of Mrs. Banning's 18-acre tract, 26.56 chains to 4 x 4 post marked L. B. and M. H. B.; thence south 56° 30' W. along north line of said 461.13 acre tract of tide land, 1.37 chains to 4 x 4 post marked L. B.; thence south 29° west 49 links to post 4 x 4 marked L. B. and M. B.; thence south 25.74 chains to south line of said 461.13 acre tract; thence north 76° 50' east 1.32 chains to the place of beginning, containing 3.38 acres of land, more or less.

2nd. A portion of the 461.13 acre tract of tide land location No. 57, lying westerly of the land of the Southern California Co-operative and Warehouse Shipping Association's land, and more particularly described as follows, to wit:

Commencing at a 4 x 4 redwood post marked L. B. and M. H. B. at the northwest corner of the 15.06 acre tract of tide land allotted to Mrs. Mary H. Banning as tract No. 20 of her property; thence north 72° 45' W. along north line of said 461.13 acre tract 1.26 chains to 4 x 4 post marked L. B. and M. B.; thence south 9° 22' E. 26.66 chains to south line of said 461.13 acre tract; thence north 58° .08' E. 1.20 chains to the southwest corner of said 15.06 acre tract allotted to Mrs. Banning; thence north 9° 22' W. along west line of said 15.06 acre tract 25.63 chains to the place of beginning, and containing 3.01 acres, more or less; excepting therefrom the railroad right of way as now used by the Southern Pacific railroad.

3rd. A portion of the 461.13 acre tract of tide land location No. 57 described as follows:

Commencing at a 4 x 4 post marked L. B. and M. B. on the northwesterly side of said 461.13 acre tract distant south 61° W. 11 chains, and south 22° 30' W. 8.50 chains from post at Los Barriles or Barrel Springs; thence following the boundary line of said 461.13 acre tract south 22° 30' W. 3 chains; thence south 14° E. 2.40 chains; thence north 62° 30' E. 1.41 chains; thence south

20° E. 3 chains; thence south 63° E. 1.50 chains; thence south 23° 30' E. 1.50 chains; thence south 16° W. 4 chains; thence north 78° E. 2.65 chains; thence south 43° E. 1.20 chains; thence south 19° east 1.50 chains; thence south 14° 30' east 3 chains; thence south 52° 30' east, 1.57 chains to 4 x 4 post marked L. B. and M. H. B.; thence across the mud flats along the line of the 82 acre tract allotted to Mrs. M. H. Banning, south 33° 15' east, 31.98 27 chains to the south line of the 461.13 acre tract; thence north 58° .08' east, 2.90 chains; thence north 32° 40' west, 52.41 chains to the place of beginning, containing 15.37 acres, more or less.

That the defendant, Mace Greenleaf, is the husband of Lucy T. Greenleaf, but disclaims any interest in or to any of the lands described in the amended complaint.

III.

They deny that the land described in the plaintiff's amended complaint, or that the lands belonging to the defendants Mary H. Banning and Lucy T. Greenleaf hereinbefore described, is now, or that it ever has been, a portion of the bed of the said inner bay of San Pedro; and they deny that the whole of the said land lies or has always been, or ever was, below the line of ordinary high tide in the said bay, although they admit that portions of the land described in the said third paragraph of the amended complaint lies below the line of ordinary high tide, but they further aver that a large portion of the tract described in the said third paragraph of the complaint, and the tracts described herein as belonging to the defendants Mary H. Banning and Lucy T. Greenleaf, are now, and always have been, above the line of ordinary high tide.

IV.

28 They have no information or belief sufficient to enable them to answer the allegation of the fourth paragraph of said amended complaint concerning the location of the said lands with reference to the cities of San Pedro and Wilmington, and basing their denial upon that ground, deny that said land lies partly within the limits of the said city of San Pedro and partly within the limits of the city of Wilmington, or that the same ever was within the said limits, and deny that the whole of the said land at all times prior to 1870, or at any time prior thereto or since, has been within two miles of the cities or towns of San Pedro and Wilmington, or either of them.

V.

They further deny that no portion of the said land is now, or ever has been, reclaimable for agricultural or other purposes, but on the contrary, they aver upon information and belief, that all of the said lands have been at all times herein mentioned, susceptible of reclamation for agricultural purposes.

VI.

They deny that the said land described herein or described in the third paragraph of said amended complaint, has been at all times, or at any time, withheld from sale by the state of California.

VII.

These defendants admit that they each claim an interest in the said land adversely to the plaintiffs, except as to the defendant Mace Greenleaf, who claims no interest in the said premises; and they admit that they claim and assert an interest in the said land under a common source of title, to wit, under a state patent issued by the state of California to Phineas Banning, and which patent was dated the 16th day of December, 1881, and which was based upon, and issued in pursuance of a certificate of purchase of said land dated the 10th of April, 1880, issued to said Phineas Banning by the state of California under the authority of the laws of this state providing for the sale of swamp, overflowed, salt marsh and tide lands, but these defendants deny that their claims to the said lands, or any part thereof, are, or either of them is, invalid or without right, but on the contrary they aver that their title to the lands in this amended answer hereinbefore described are paramount and superior to the rights of the state of California, the plaintiff herein, or to any other person or party.

For a further and affirmative second defense to this action, these defendants aver.

I.

That in February of 1863 Phineas Banning made application to the state of California, under the act of the legislature of the state of California for the disposition of state lands, to purchase a tract of land comprising the tract described in the third paragraph of the amended complaint herein, and that pursuant to the said application the said land was duly surveyed, but that subsequently, in order to correct a defect in the survey thereof the said Phineas Banning made, in conformity to the law, an amended application comprising the said tract of land, and a re-survey of the said tract was duly made in accordance with the requirements of the laws of the state California as they then existed with respect to the disposition of state lands, and thereupon he did pay to the treasurer of Los Angeles county 20% of the purchase price of the said land, and interest on the balance in advance, at the rate of 10% per annum, as required by law.

Said defendants further aver that subsequently other applications to purchase other tracts of land in the same vicinity were made by other parties which overlapped or conflicted with that of the said Phineas Banning; and one of the said applicants, to wit, William McFadden, thereupon made a demand upon the surveyor general of the state that the contest between the said applicants should be referred to the proper court for judicial determination of the question which of the said parties, if any, were entitled to a patent from

the state of California for the lands involved in their said respective applications, and which application was made pursuant to the provisions of section 3413 of the Political Code of the state of California;

and thereupon an order was made by the said surveyor general referring to the said contest to the district court of the 17th judicial district of the state of California in and for the county of Los Angeles, for a final determination of said conflicting claims; and thereupon the said William McFarland did commence an action against the said Phineas Banning, H. B. Tichenor, C. E. Parker and the Southern Pacific Railroad Company, and in the said suit such proceedings were had that after a trial thereof it was found and adjudged that the defendant Phineas Banning was entitled to purchase and to have a patent issued to him for the tract of land described in the third paragraph of the amended complaint herein; and thereupon and on the 28th day of November, 1879, a judgment was duly given, made and entered in the said action wherein it was adjudged that the said defendant Phineas Banning was entitled to an approval of his survey and application as to all of the land described in his amendatory application of January 2, 1878, hereinbefore referred to except a tract of land described as follows:

Commencing at the S. W. corner of a house formerly known as the quartermaster barn and running easterly along the southern line of said barn and of the quartermaster shed two hundred and seventy-two (272) feet; thence southerly and at right angles to the northern boundary of said quartermaster's barn and adjacent shed eleven hundred and twenty (1120) feet more or less, —to the northern boundary of the railroad site as delineated on the plat thereof filed in the office of the surveyor general and comptroller of the state—thence westerly along said northern boundary a little more than 272 feet to the intersection of said northern boundary on its prolongation with a line drawn from the S. W. corner of said quartermaster barn perpendicular to the northern boundary of said barn and adjacent shed, and parallel with the line secondly above described; thence northerly along said line last aforesaid and parallel to the western boundary to the point of beginning, said tract being bounded on the north by the quartermaster barn and shed, on the east and west by parallel lines perpendicular to the northern boundary of said barn and adjacent shed, and on the south by the northern boundary of the reservation of the Southern Pacific Railroad Company as represented on the plat aforesaid, or by the prolongation of said line.

And further adjudging that the said Banning was entitled, upon complying with the further provisions of the law, to purchase the same and to receive a patent therefor.

Defendants aver that subsequently, and in due time, the said Phineas Banning did pay the balance of the purchase price of the said tract of land, and thereupon on the 10th of April, 1880, there was issued to him a certificate of purchase whereby it was certified that the said Banning had in all respects complied with the provisions of the law with respect to the disposition

of such lands, and was entitled to receive a patent for the same; and further, on December 14, 1881, another certificate was issued certifying that full payment had been made to the state for the said tract of land, and that the decree of the said court in the action referred to had been fully complied with, and the said applicant was entitled to a patent for the said land described in the said decree.

And thereafter, and on the 16th day of December, 1881, the said patent was issued to the said Phineas Banning in accordance with the said certificate and the said decree, and the same was duly recorded in the office of the county recorder of Los Angeles county in book 3, page 46 of patents.

II.

That the defendants Mary H. Banning and Lucy T. Greenleaf have succeeded by mesne conveyances from the said Phineas Banning, to the title to the said respective tracts hereinbefore described in this amended answer as belonging to them, and by virtue of the said proceedings the title has become vested in them in fee simple, free of and paramount to any interest or claim of the state of California or any other person or party, and the said state of
34 California and the whole world are estopped by the said judgment and the said proceedings from claiming any interest, right or title in and to the said lands or any part thereof, and the said judgment and the said patent and the proceedings above recited are a bar to any such claims on the part of the said plaintiffs or on the part of anyone.

For a further and third defense to this action, these defendants aver:

I.

That this action is barred by the provisions of sections 312, 315, 316 and 317 of the Code of Civil Procedure of the state of California; and the said action is further barred by the provisions of sections 318 and 319 of the Code of Civil Procedure of the state of California.

Wherefore, these defendants pray that the plaintiff take nothing by its action, and that these defendants recover their costs herein, and for such other and further relief as may be just.

WARD CHAPMAN,

*Attorney for Defendants Mary H. Banning,
Lucy T. Greenleaf and Mace Greenleaf.*

(Duly verified.)

[Endorsed:] Received copy of the within amended answer this 1st day of July, 1909. Anderson & Anderson, et al., attorneys for pl'ff. Filed Jul. 1, 1909. C. G. Keyes, clerk; by L. E. Lampton, deputy.

Amended Answer of Banning Co. to Amended Complaint.

Now come the defendants Banning Company, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company, and for answer to the amended complaint herein file this their amended answer pursuant to stipulation, and say:

I.

Deny that all of the bay referred to in section II of said amended complaint, or its arms or estuaries or channels were, on September 9th, 1850, or at all times since then, or at any time since then, have been or are now navigable waters of this state, or of the United States, or used for the purposes of navigation, excepting a small portion thereof, and a certain other portion that was dredged by mechanical means.

II.

Deny that the state of California is the owner of that certain parcel of land particularly described in section III of said amended complaint designated as location No. 57, state tide lands, containing 461.13 acres, or any part thereof.

III.

Deny that said land is now or at any time has been a portion of the bed of said inner bay of San Pedro, or any other bay; and deny that the whole of said land at all times since prior to 1870, or
36 at any time prior to December 26th, 1905, -as been within two miles of the city or town of Wilmington, and deny that the whole of said land, or any part thereof, at all times or at any time since prior to 1870, or at any time prior to March 1st, 1888, has been within two miles of the city or town of San Pedro; and deny that no portion of said land is now or ever has been reclaimable for agricultural or other purposes; but on the contrary, aver, that said land is now and always has been reclaimable for agricultural or other purposes; and deny that said land, or any part thereof, has at all times or at any time been withheld from sale by the state of California.

IV.

Defendants admit that they and each of them claim some interest and estate in said land adverse to the plaintiffs; but deny that all or any of the claims of defendants to said land, or any part thereof, are or that each of them is invalid, or without right, but, on the contrary, defendants aver that their several claims are valid and binding upon plaintiffs.

And defendants deny that the patent referred to in section V of said amended complaint was a pretended patent, or that the

certificate of purchase in said section referred to was a pretended certificate of purchase; but aver that said patent and certificate of purchase are, and each of them is, valid and binding upon the plaintiffs.

37

V.

And for a further and separate answer the defendants aver that prior to the commencement of this action, and prior to the first day of March, 1888, to wit, on the 20th day of February, 1878, the surveyor general of the state of California as agent and officer of said state, and as its act, duly gave and made his order, in accordance with the provisions of the statutes of the state of California in such cases made and provided, referring to the District Court of Los Angeles county, California, for determination of contests arising from the conflicting claims concerning the approval of the surveys and locations between one James McFadden, one Phineas Banning, the predecessor in interest in said lands of these defendants herein to certain land in Los Angeles county, including the lands described in plaintiffs' amended complaint herein one H. B. Tichenor, one C. E. Parker, and the Southern Pacific Railroad Company; and that thereafter, to wit, on April 19th, 1878, said James McFadden commenced an action in the District Court of the Seventeenth Judicial District of the state of California, in and for the county of Los Angeles, entitled James McFadden, plaintiff, vs. Phineas Banning, H. B. Tichenor, C. E. Parker and Southern Pacific R. R. Co., defendants, and that thereafter on the 26th day of November, 1879, after the trial of said cause, the said District Court by judgment and decree duly made and filed

38 therein on said day, did determine the contest therein tried, and did order, adjudge and decree that said Phineas Banning had the right and was entitled to purchase of the state of California the lands and the whole thereof described in plaintiff's amended complaint herein, and it was by said judgment further ordered, adjudged and decreed that upon filing with the surveyor general of the state of California a copy of said decree, that said surveyor general approve the survey accompanying the application of said Phineas Banning for the purchase of the lands described in the complaint herein, and to issue to said Phineas Banning a proper certificate of purchase of other evidence of title or right, in accordance therewith, upon the payment of the amount prescribed by law; said judgment and decree is in words and figures following, to wit:

In the Seventeenth Judicial Court, Los Angeles County.

JAMES McFADDEN, Plaintiff,
vs.
PHINEAS BANNING et al., Defendants.

Judgment.

This cause came on for trial on the 26th day of November, 1879, before the court sitting without a jury, upon the complaint and answers of the defendants Banning, Tichenor and the Southern Pacific Railroad Company, and the default of the defendant Parker
39 duly entered and the court having duly tried the case filed its findings of fact and conclusions of law—by virtue of which and the law and the evidence it is adjudged that the defendant Banning is entitled to an approval of his survey and application as to all of the land described in his amendatory application of January 2nd, 1878, except the tract of land described as follows, to wit:

Commencing at the S. W. corner of a house formerly known as the quartermaster barn and running easterly along the southern line of said barn and of the quartermaster shed two hundred and seventy-two (272) feet, thence southerly and at right angles to the northern boundary of said quartermasters' barn and adjacent shed (eleven hundred and twenty) 1120 feet more or less,—to the northern boundary of the railroad site as delineated on the plat thereof filed in the office of the recorder of Los Angeles county, and also in the offices of the surveyor general and controller of the state—thence westerly along said northern boundary a little more than 272 feet to the intersection of said northern boundary on its prolongation with a line drawn from the S. W. corner of said quartermaster barn perpendicular to the northern boundary of said barn and adjacent shed, and parallel with the line secondly above described; thence northerly along said line last aforesaid and parallel to the western boundary to the point of beginning, said tract being
40 bounded on the north by the quartermaster bar and shed, on the east and west by parallel lines perpendicular to the northern boundary of said barn and adjacent shed and on the south by the northern boundary of the reservation of the Southern Pacific Railroad Company as represented on the plat aforesaid or by the prolongation of said line. Said reservation being more particularly mentioned in the answer of said corporation and hereinafter in this judgment; the right of said Banning to purchase said land — be also subject to the title of the Southern Pacific Railroad Company as hereinafter specified. And it is further adjudged that with the said exception and reservation the said Banning is entitled upon complying with the further provisions of the laws to purchase the same and to receive a patent therefor. And it is further adjudged that as to the tract above excepted and described, the plaintiff to that extent is entitled to an approval of his survey and

no further; and that said survey be corrected accordingly so as to include said tract and no more. And it is further adjudged that the survey so amended be approved and that the plaintiff upon complying with the further provisions of the law be entitled to purchase said land and to receive a patent therefor, and it is further adjudged that the defendant, the Southern Pacific Railroad Company, is a corporation, duly incorporated under the laws of the

41 state of California and is, and at the time hereinafter mentioned was the owner of the San Pedro Railroad Company, and that said defendant under and by virtue of the statutes for such cases made and provided has duly selected the tract of land represented upon and described in the plats hereinafter referred to as a site for their depot and other buildings and for roadway and has located and occupied and held the same according to law for those purposes; and on the 29th day of January, 1879, did transmit to and file with the surveyor general and controller of the state, and with the recorder of the county of Los Angeles correct plats of the tract selected as required by law, and that the said tract was and is necessary for the use of said corporation for the purposes aforesaid, and it is further adjudged that the said defendant is entitled to hold, occupy and use the said tract of land so long as they may choose to do so for the purposes aforesaid and that the title of the defendant Banning is and shall be subject to said right. And it is further adjudged that application of the other parties making applications for the lands hereinbefore referred to are invalid, void and that the parties making the same have no right to an approval of their survey or to purchase said land or any part thereof.

SEPULVEDA, *Judge.*

42 That in accordance with said judgment and decree, said Phineas Banning filed with the surveyor general of the state of California a certified copy of said judgment, and paid to the proper officer the amount prescribed by law, and that thereafter, to wit, on the 25th day of February, 1880, the surveyor general approved the application of said Phineas Banning to purchase said lands, and issued a certificate of purchase therefor on the 10th day of April, 1880, numbered 43, and thereafter to wit, on the 14th day of December, 1881, the registrar of the state land office issued his certificate No. 189, certifying that full payment had been made to the state of California by Phineas Banning for the purchase of said land, and that thereafter, to wit, on the 16th day of December, 1881, a patent was issued by the state of California to said Phineas Banning conveying to his, his heirs and assigns, the premises described in the complaint herewith, in accordance with said judgment.

That by said judgment and decree and subsequent proceedings thereunder the matters herein in litigation were finally adjudicated and settled, and the plaintiffs are thereby debarred from prosecuting this action.

And these defendants allege that they are the successors in in-

terest in said lands of the said Phineas Banning, and that they and their said predecessor in interest for more than twenty-five
 43 years prior to the commencement of this action have been in the exclusive, continuous, open and notorious possession of said premises, claiming them and the whole thereof as their own as against the plaintiffs and all the world, and have in addition to the large sums of money paid for the purchase of said land as aforesaid, expended other large sums in the improvement thereof, and the maintenance of the same, and in paying all taxes levied thereon, and the plaintiffs ought not to be heard to say that the defendants have no right, title or interest in or to said land.

VI.

And defendants aver that their several interests and holdings and ownership of said land are in severalty and as follows, to wit:

That the said Banning Company owns and is in the possession of and entitled to the possession of the following two described parcels of land embraced within the land described in said amended complaint, which are as follows, to wit:

1. Commencing at a point on the southerly line of said location No. 57 distant thereon south $76^{\circ} 50'$ west, 9.26 chains from the southeast corner of said location No. 57; thence north 23.72 chains to a point; thence south 29° west 1.76 chains to the most easterly corner of the depot grounds of the Southern Pacific Railroad Company at Wilmington; thence along the easterly boundary line of the
 44 said depot grounds south $26^{\circ} 30'$ west, 23.00 chains to a point; thence continuing along said easterly boundary line south $35^{\circ} 15'$ west, 2.27 chains to a point; thence continuing along said easterly boundary line, south 2.86 chains to the southerly boundary line of said location No. 57; thence along said southerly boundary line of location No. 57 north $76^{\circ} 50'$ east, 13.64 chains, more or less, to the point of beginning.

2. That parcel of land particularly described as a portion of location No. 57, state tide lands, Los Angeles county, township No. 5 south, range No. 13, west, San Bernardino meridian, more particularly described as follows, to wit:

Commencing at a point which point is the westerly end of the forty-third course described in the field notes of said location No. 57; thence, following the courses and distances of said field notes, north 11° east, 5.50 chains to a point; thence north $65\frac{1}{4}^{\circ}$ west, 7.00 chains to a point; thence south $77\frac{1}{4}^{\circ}$ west, 32.00 chains to a point; thence north $77\frac{3}{4}^{\circ}$ west, 10.46 chains to a point; thence south 86° west, 7.30 chains to a point called "Las Bariles" or Barrel Springs, as described in said field notes; thence south 61° west, 11.00 chains to a point; thence south $22^{\circ} 30'$ west, 2.60 chains to a point; thence, leaving the courses and distances of said field notes, south $28^{\circ} 41'$ east, 55.88 chains to a point on the southerly boundary line of said location No. 57; thence along the southerly
 45 boundary line of said location No. 57, north $58^{\circ} 08'$ east 49.64 chains to a point; thence, leaving said southerly boun-

dary line of said location No. 57 north $9^{\circ} 22'$ west 27.69 chains to the point of beginning.

That the said defendant Hancock Banning owns, and is entitled to the possession, and is in possession of the parcel of land described in plaintiffs' amendment to their amended complaint.

And that the said defendant Mary H. Norris owns and is in possession of the following described three parcels of land:

Those certain pieces of land in Los Angeles county, California, being part of location No. 57, state tide lands, township No. 5 south, range No. 13 west, San Bernardino meridian, and particularly described as follows, to wit:

1st. The following tract of tide land lying easterly of the depot and railroad tracks of the Southern Pacific Railroad, and being a portion of location No. 57, state tide lands, to wit:

Commencing at a point on the southerly boundary line of said location No. 57, distant south $76^{\circ} 50'$ west, 7.94 chains from southwest corner of said location No. 57; said point being the southwest corner of the 3.38 acre tract of tide lands allotted to Lucy T. Banning in the final decree filed March 5, 1891, in Superior Court case

No. 6395, entitled Banning et al. vs. Banning et al.; thence, 46 following the westerly line of said 3.38 acre tract north 25.74

chains to a stake marked MB and L.B. on the northerly boundary line of said location No. 57; thence south 29° west 2.66 chains to a 4 x 4 post marked M.B. and H.B.; thence south 23.72 chains to a point in the southerly boundary line of said location No. 57; thence north $76^{\circ} 50'$ east, 1.32 chains to the point of commencement, containing 3.18 acres, more or less. Saving and excepting that part of said 3.18 acre piece which may be included in the Southern Pacific Railroad Company's right of way.

2nd. The following tract of tide land lying west of the lands known as the Southern California Co-operative Warehouse & Shipping Association's lands, and described as follows, to wit:

Commencing at a 4x4 post marked M.B. and L.B. in the northerly boundary line of said location No. 57, and being the northwest corner of tract No. 6 allotted to Lucy T. Banning in the final decree in the aforesaid Superior Court case No. 6395, and running thence north $72^{\circ} 45'$ west, 1.26 chains to a 4x4 post marked M.B. and H.B., at an angle in the northerly boundary line of said location No. 57; thence south $9^{\circ} 22'$ east, 27.69 chains to a point in the southerly boundary line of said location No. 57; thence north $58^{\circ} 08'$ east, 1.20 chains to the southwest corner of the said tract No. 6, allotted

to said Lucy T. Banning as aforesaid; thence north $9^{\circ} 22'$ 47 west along the west line of said tract No. 6 as aforesaid, 26.66 chains to the point of commencement; containing 3.13 acres, more or less. Saving and excepting what part of said 3.13 acres may be included in the Southern Pacific Railroad Company's right of way.

3rd. The following tract of tide land described as follows, to wit:

Commencing at a 4x4 post marked M.B. and L.B. on the northerly boundary line of the said location No. 57; said point being the northeast corner of the 15.37 acre tract allotted to Lucy T. Banning

in the final decree in the aforesaid Superior Court case No. 6395; thence along the easterly line of the said 15.37 acre tract south $32^{\circ} 40'$ east, 52.41 chains to a point on the southerly boundary line of said location No. 57; thence north $58^{\circ} 08'$ east, 1.00 chains; thence north $28^{\circ} 41'$ west, 55.88 chains to a 4x4 post marked M.B. and H.B. on the northerly boundary line of the said location No. 57; thence south $22^{\circ} 30'$ west, 5.90 chains to the point of commencement; containing 15.58 acres, more or less.

And that the said defendant Pacific Electric Railway Company, a railroad corporation, is the owner of, entitled to the possession and in the possession of that certain right of way for a railroad described in that certain deed from the Banning Company to the

Pacific Electric Railway Company, dated August 14th, 1903, 48 and recorded in book 1838, of deeds, at page 246, in the office of the county recorder of said county.

And that the defendant Pacific Electric Railway Company a railroad corporation, is the owner of and entitled to the possession of that certain right of way described as follows, to wit:

Those certain pieces of land in Los Angeles county, California, being parts of location No. 57, state tide lands, township No. 5 south, range No. 13 west, San Bernardino meridian, to wit:

A strip of land sixty (60) feet in width having for its northerly boundary the northerly boundary line of said location No. 57 and for its southerly boundary the southerly boundary line of the said location No. 57, and lying twenty (20) feet on the easterly side and forty (40) feet on the westerly side of the center line between double tracks of the Pacific Electric Railway Company's railroad as the same is now constructed over, on and across the said location No. 57.

And that the said railroad corporation has heretofore constructed and equipped a double track railroad over said right of way last described, and is operating a railroad thereon and thereover for the carriage of passengers and freight as a common carrier to and from the cities of San Pedro and Wilmington, and has so maintained and operated said railroad for more than five years prior to the commencement of this action.

49 That said last described right of way and the use thereof as now exercised as hereinbefore alleged and for the construction thereon of additional and necessary works and adjuncts for the operation of said railroad is now and will continue to be necessary to enable the said defendant Pacific Electric Railway Company to properly perform its functions as such common carrier, and that during all of said time prior to the commencement of this action, the plaintiffs have been fully aware of all the facts hereinbefore stated, and knew of the necessity of said defendant railroad corporation, and the use to which it had been, was and now is devoting said land and premises herein described as used by said defendant for said right of way.

The defendants aver that by reason of the facts aforesaid, plaintiffs are estopped to deny the right of said railroad corporation to continue the use of said land and the whole thereof for the main-

tenance and operation of its said railroad thereon and thereover as aforesaid.

All of which aforesaid parcels of land are embraced within the tract of land described in plaintiffs' amended complaint.

VII.

The defendants aver that they and each of them have been in the quiet and peaceable possession of the pieces or parcels of land described in the amended complaint herein, each of them
50 holding and claiming the same adversely to the plaintiffs and to all other persons for more than ten years before the commencement of this suit, and have paid all taxes levied thereon; and that said plaintiffs were not seized nor possessed of said pieces or parcels of land, or any of them, or any portion of the same, within ten years before the commencement of this action; and that the cause of action stated in the complaint of the plaintiffs herein is and was, prior to the commencement of this action, barred by the provisions of section 315 of the Code of Civil Procedure of the state of California.

VIII.

And defendants further aver that they and each of them have been in the quiet and peaceable possession of the pieces or parcels of land described in the complaint herein, and each of them, holding and claiming the same adversely to the plaintiffs and all other persons, for more than five years before the commencement of this action, and have paid all taxes levied thereon, and that the said plaintiffs were not seized or possessed of said pieces or parcels of land, or any of them, or any portion of the same within five years before the commencement of this action; and that the cause of action stated in the amended complaint herein is and was, prior to the commencement of this action, barred by the provisions of section 318 of the Code of Civil Procedure of the State of Cali-
51 fornia.

IX.

And for a further and separate defense, defendants aver that the plaintiffs in seeking to annul and make void the title of the defendants to said land and to deprive them of said land and the improvements thereon, without compensating them therefor, are depriving the defendants of their said property without due process of law; and deny to the defendants the equal protection of the law contrary to article XIV, section One, of the amendments to the Constitution of the United States.

Wherefore, defendants pray that plaintiffs take nothing by their said action and that defendants be hence dismissed with their costs and awarded such other and further relief in the premises as may be meet and equitable.

GIBSON, TRASK, DUNN & CRUTCHER.

*Attorneys for Banning Company, Mary H.
Norris, Hancock Banning and Pacific Elec-
tric Railway Company.*

(Duly verified.)

Endorsed: Received copy of the within this 2nd day of July, 1909. Anderson & Anderson. Filed Jul. 2, 1909. C. G. Keyes, clerk; by E. G. Riggins, deputy.

52

[Title of Court and Cause.]

Amended Answer of Los Angeles Harbor Co. and Imperial Investment Co. to Amended Complaint.

Now come the defendants, Los Angeles Harbor Company and Imperial Investment Company, and for answer to the amended complaint herein file this their amended answer pursuant to stipulation, and say.

I.

Deny that all of the bay referred to in section II of said amended complaint, or its arms or estuaries or channels were, on September 9, 1850, or at all times since then, or at any time since then, have been or are now navigable waters of this state, or of the United States, or used for the purposes of navigation, excepting a small portion thereof, and a certain other portion that was dredged by mechanical means.

II.

Deny that the state of California is the owner of that certain parcel of land particularly described in section III of said amended complaint designated as location No. 57, state tide lands, containing 461.13 acres, or any part thereof.

III.

Deny that said land is now or at any time has been a portion of the bed of said inner bay of San Pedro, or any other bay; and deny that the whole of said land at all times since prior to 1870, or
53 at any time prior to December 26th, 1905, has been within two miles of the city or town of Wilmington, and deny that the whole of said land, or any part thereof, at all times or at any time since prior to 1870, or at any time prior to March 1st, 1888, has been within two miles of the city or town of San Pedro; and deny that no portion of said land is now or ever has been reclaimable for agricultural or other purposes; but on the contrary, aver that said land is now and always has been reclaimable for agricultural or other purposes; and deny that said land, or any part thereof, has at all times or at any time been withheld from sale by the state of California.

IV.

Defendants admit that they and each of them claim some interest and estate in said land adverse to the plaintiffs; but deny that all or any of the claims of defendants to said land, or any part thereof, are or that each of them is invalid, or without right, but, on the contrary, defendants aver that their several claims are valid and binding upon plaintiffs.

And defendants deny that the patent referred to in section V of said amended complaint was a pretended patent, or that the certificate of purchase in said section referred to was a pretended certificate of purchase; but aver that said patent and certificate of purchase are, and each of them is, valid and binding upon the plaintiffs.

54

V.

And for a further and separate answer the defendants aver that prior to the commencement of this action, and prior to the first day of March, 1888, to wit: on the 20th day of February, 1878, the surveyor general of the state of California, as agent and officer of said state, and as its act, duly gave and made his order, in accordance with the provisions of the statutes of the state of California in such cases made and provided, referring to the District Court of Los Angeles county, California, for determination of contests arising from the conflicting claims concerning the approval of the surveys and locations between one James McFadden, one Phineas Banning, the predecessor in interest in said lands of these defendants herein to certain land in Los Angeles county, including the lands described in plaintiffs' amended complaint herein, one H. B. Tichenor, one C. E. Parker, and the Southern Pacific Railroad Company; and that thereafter, to wit: On April 19th, 1878, said James McFadden commenced an action in the District Court of the Seventeenth Judicial District of the state of California, in and for the county of Los Angeles, entitled James McFadden, plaintiff, vs. Phineas Banning, H. B. Tichenor, C. E. Parker and Southern Pacific R. R. Co., defendants, and that thereafter on the 26th day of November, 1879,

55

after the trial of said cause, the said District Court, by judgment and decree duly made and filed therein on said day, did determine the contest therein tried, and did order, adjudge and decree that said Phineas Banning had the right and was entitled to purchase of the state of California the lands and the whole thereof described in plaintiff's amended complaint herein, and it was by said judgment further ordered, adjudged and decreed that upon filing with the surveyor general of the state of California a copy of said decree, that said surveyor general approve the survey accompanying the application of said Phineas Banning for the purchase of the lands described in the complaint herein, and to issue to said Phineas Banning a proper certificate of purchase or other evidence of title or right, in accordance therewith, upon the payment of the amount prescribed by law; said judgment and decree is in words and figures following, to wit:

"In the Seventeenth Judicial Court, Los Angeles County.

JAMES MCFADDEN, Plaintiff,

VS.

PHINEAS BANNING et al., Defendants.

Judgment.

This cause came on for trial on the 26th day of November, 1879, before the court sitting without a jury, upon the complaint and answers of the defendants, Banning, Tichenor and the Southern Pacific Railroad Company, and the default of the defendant Parker duly entered and the court having duly tried the case filed its findings of fact and conclusions of law—by virtue of which and the law and the evidence it is adjudged that the defendant Banning is entitled to an approval of his survey and application as to all of the land described in his amendatory application of January 2nd, 1878, except the tract of land described as follows, to wit:

Commencing at the S. W. corner of a house formerly known as the quartermaster barn and running easterly along the southern line of said barn and of the quartermaster shed two hundred and seventy-two (272) feet, thence southerly and at right angles to the northern boundary of said quartermaster's barn and adjacent shed (eleven hundred and twenty) 1120 feet more or less,—to the northern boundary of the railroad site as delineated on the plat thereof filed in the office of the recorder of Los Angeles county, and also in the offices of the surveyor general and controller of the state—thence westerly along said northern boundary a little more than 272 feet to the intersection of said northern boundary on its prolongation with a line drawn from the S. W. corner of said quartermaster barn perpendicular to the northern boundary of said barn and adjacent shed, and parallel with the line secondly above described; thence northerly along said line last aforesaid and
 56 parallel to the western boundary to the point of beginning, said tract being bounded on the north by the quartermaster barn and shed, on the east and west by parallel lines perpendicular to the northern boundary of said barn and adjacent shed and on the south by the northern boundary of the reservation of the Southern Pacific Railroad Company as represented on the plat aforesaid or by the prolongation of said line. Said reservation being more particularly mentioned in the answer of said corporation and hereinafter in this judgment; the right of said Banning to purchase said land — be also subject to the title of the Southern Pacific Railroad Company as hereinafter specified. And it is further adjudged that with the said exception and reservation the said Banning is entitled upon complying with the further provisions of the laws to purchase the same and to receive a patent therefore. And it is further adjudged that as to the tract above excepted and described, the plaintiff to that extent is entitled to an approval of his survey and no

further; and that said survey be corrected accordingly so as to include said tract and no more. And it is further adjudged that the survey so amended be approved and that the plaintiff upon complying with the further provisions of the law be entitled to purchase said land and to receive a patent therefor, and it is further

58 adjudged that the defendant, the Southern Pacific Railroad Company, is a corporation, duly incorporated under the laws of the state of California and is, and at the time hereinafter mentioned was the owner of the San Pedro Railroad Company, and that said defendant under and by virtue of the statutes for such cases made and provided has duly selected the tract of land represented upon and described in the plats hereinafter referred to as a site for their depot and other buildings and for roadway and has located and occupied and held the same according to law for those purposes; and on the 29th day of January, 1879, did transmit to and file with the surveyor general and controller of the state, and with the recorder of the county of Los Angeles correct plats of the tract selected as required by law, and that the said tract was and is necessary for the use of said corporation for the purposes aforesaid, and it is further adjudged that the said defendant is entitled to hold, occupy and use the said tract of land so long as they may choose to do so for the purposes aforesaid and that the title of the defendant Banning is and shall be subject to said right. And it is further adjudged that application of the other parties making applications for the lands hereinbefore referred to are invalid, void and that the parties making the same have no right to an approval of their survey or to purchase said land or any part thereof.

SEPULVEDA, *Judge.*"

59 That in accordance with said judgment and decree, said Phineas Banning filed with the surveyor general of the state of California a certified copy of said judgment, and paid to the proper officer the amount prescribed by law, and that thereafter, to wit: On the 25th day of February, 1880, the surveyor general approved the application of said Phineas Banning to purchase said lands, and issued a certificate of purchase therefor on the 10th day of April, 1880, numbered 43, and thereafter, to wit: on the 14th day of December, 1881, the registrar of the state land office issued his certificate No. 189, certifying that full payment had been made to the state of California by Phineas Banning for the purchase of said land, and that thereafter, to wit: on the 16th day of December, 1881, a patent was issued by the state of California to said Phineas Banning conveying to him, his heirs and assigns, the premises described in the complaint herewith, in accordance with said judgment.

That by said judgment and decree and subsequent proceedings thereunder the matters herein in litigation were finally adjudicated and settled, and the plaintiffs are thereby debarred from prosecuting this action.

And these defendants allege that they are the successors in interest in said lands of the said Phineas Banning, and that they and their

60 said predecessor in interest for more than twenty-five years prior to the commencement of this action have been in the exclusive, continuous, open and notorious possession of said premises, claiming them and the whole thereof as their own as against the plaintiffs and all the world, and have in addition to the large sums of money paid for the purchase of said land as aforesaid, expended other large sums in the improvement thereof, and the maintenance of the same, and in paying all taxes levied thereon, and the plaintiffs ought not to be heard to say that the defendants have no right, title or interest in or to said land.

VI.

These defendants allege that they have an interest under lease and contract to purchase all of the lands hereinafter described from the defendants, Mary H. Banning and Lucy T. Greenleaf, and that said Mary H. Banning is the owner in fee simple and in possession of that portion of the land described in plaintiff's complaint described as follows:

All that real property in the county of Los Angeles, state of California, described as follows:

A certain piece of tide land, being a portion of what is known as the 461.13 acre tract or location No. 57, state tide lands, particularly described as follows:

Commencing at the southwest corner of the 461.13 acre tract; said point being on the range line between ranges 13 and
61 14 west, of San Bernardino meridian, and distant south 40.44 chains from the southwest corner of section 6, T. 5 S., R. 13 W., S. B. M.; thence following the southerly line of the 461.13 acre tract across mud flats north $58^{\circ} .08'$ east, 64.63 chains; thence north $33^{\circ} 15' W.$ 31.98 chains to a point in the westerly side of said 461.13 acre tract, a 4 x 4 post marked M. H. B. and L. B.; thence following the meanders of the outside line of said 461.13 acre tract S. $4^{\circ} E.$ 2 chains; thence south $12^{\circ} W.$ 4.50 chains; thence N. $66^{\circ} E.$ 3.15 chains; thence S. $11^{\circ} E.$ 4.85 chains; thence S. $9^{\circ} W.$ 8.70 chains; thence S. $19^{\circ} W.$ 3.75 chains; thence S. $28^{\circ} 30' W.$ 4.50 chains; thence S. $46^{\circ} W.$ 8.16 chains; thence S. $53^{\circ} W.$ 6.50 chains; thence N. $78^{\circ} W.$ 70 links; thence north $10^{\circ} W.$ 3.60 chains; thence west 2.50 chains; thence S. $5^{\circ} 30' west$ 1.81 chains thence S. $76^{\circ} 30' W.$ 3 chains; thence S. $24^{\circ} east$ 2.87 chains; thence S. $44^{\circ} 30' west$ 6.27 chains; thence N. $70^{\circ} west$ 3.70 chains; thence north $62^{\circ} 15' west$ 7.50 chains; thence S. $72^{\circ} west$ 4.55 chains to a point on the range line on the west side of section 7; thence S. 22.56 chains to the place of beginning, and containing 82 acres, more or less, except that portion of said tide land lying outside the harbor lines established by the United States government July 29, 1908.

Lucy T. Greenleaf is the owner as aforesaid, of the following described tracts:

62 A portion of the 461.13 acre tract of tide land location No. 57 described as follows:

Commencing at a 4 x 4 post marked L. B. and M. B. on the north-westerly side of said 461.13 acre tract distant south 61° W. 11 chains, and south 22° $30'$ W. 8.50 chains from post at Los Barriles or Barrel Springs; thence following the boundary line of said 461.13 acre tract south 22° $30'$ W. 3 chains; thence south 14° E. 2.40 chains; thence north 62° $30'$ E. 1.41 chains; thence south 20° E. 3 chains; thence south 63° E. 1.50 chains; thence south 23° $30'$ E. 1.50 chains; thence south 16° W. 4 chains; thence north 78° E. 2.65 chains; thence south 43° E. 1.20 chains; thence south 19° east 1.50 chains; thence south 14° $30'$ east 3 chains; thence south 52° $30'$ east, 1.57 chains to 4 x 4 post marked L. B. and M. H. B.; thence across the mud flats along the line of the 82 acre tract allotted to Mrs. M. H. Banning, south 33° $15'$ east, 31.98 chains to the south line of the 461.13 acre tract; thence north 58° $.08'$ east, 2.90 chains; thence north 32° $40'$ west, 52.41 chains to the place of beginning, containing 15.37 acres, more or less, except that portion of said tide land lying outside the harbor lines established by the United States government July 29, 1908.

VII

63 The defendants aver that they and each of them, and their predecessors in interest, have been in the quiet and peaceable possession of the pieces or parcels of land described in the amended complaint herein, each of them holding and claiming the same adversely to the plaintiffs and to all other persons for more than ten years before the commencement of this suit, and have paid all taxes levied thereon; and that said plaintiffs were not seized nor possessed of said pieces or parcels of land, or any of them, or any portion of the same, within ten years before the commencement of this action, and that the cause of action stated in the complaint of the plaintiffs herein is and was, prior to the commencement of this action, barred by the provisions of section 315 of the Code of Civil Procedure of the state of California.

VIII.

And defendants further aver that they and each of them and their predecessors in interest, have been in the quiet and peaceable possession of the pieces or parcels of land described in the complaint herein, and each of them, holding and claiming the same adversely to the plaintiffs and all other persons, for more than five years before the commencement of this action, and have paid all taxes levied thereon, and that the said plaintiffs were not seized or possessed of said pieces or parcels of land, or any of them, or any portion of the same within five years before the commencement of this action; and that the cause of action stated in the amended complaint herein is and was, prior to the commencement of this action, barred by the provisions of section 318 of the Code of Civil Procedure of the state of California.

64

IX.

And for a further and separate defense, defendants aver that the plaintiffs in seeking to annul and make void the title of the defendants to said land and to deprive them of said land and the improvements thereon, without compensating them therefor, are depriving the defendants of their said property without due process of law; and deny to the defendants the equal protection of the law contrary to Article XIV, section One, of the amendments of the Constitution of the United States.

X.

And for a further and separate answer and defense herein, these defendants allege that the city of Wilmington is now and ever since the day of —, 1905, has been a city of the sixth class, organized and existing under and in accordance with an act of the legislature of the state of California, entitled "An act to provide for the organization, incorporation and government of municipal corporations," approved March 13, 1883, and acts amendatory thereof.

XI.

That the lands hereinbefore described, are now and have been ever since said — day of —, 1905, within the corporate
65 limits of said city of Wilmington, and said lands constitute and are a part of the water front of said city and were, at all the times herein mentioned, and are now undeveloped and unimproved.

XII.

That heretofore and on or about the 11th day of April, 1907, the defendant, Imperial Investment Company, made and entered into a certain agreement, in writing, with said city of Wilmington, wherein it was provided that this defendant would erect bulk heads, dredge channels and perform certain other work necessary to improve said water front and other portions of the water front of said city, and in consideration whereof, the said city did thereby lease to this defendant the lands hereinbefore described, which said lands were and are a portion of the water front of said city of Wilmington for the term of fifty years from the date of said agreement, subject to the right of said city to maintain certain streets and other public places on and over said land which was therein reserved to said city.

XIII.

That this defendant has performed the covenants and conditions of said agreement on its part to be performed and it is now proceeding to reclaim said land and to improve said water front under and in accordance with the provisions of said agreement, which said agreement and lease is in full force and effect.

66

XIV.

That this defendant is in the exclusive, open and notorious possession of said land and premises, claiming them and the whole thereof under and in pursuance of said agreement and lease as against the plaintiffs and all the world, and said defendant has expended large sums in the improvement of said property and of the water front of said city and in the performance of said contract and lease on its part and these plaintiffs ought not to be heard to say that said defendant has no right, title or interest in or to said land.

Wherefore, defendants pray that plaintiffs take nothing by their said action and that defendants be hence dismissed with their costs and awarded such other and further relief in the premises as may be meet and equitable.

LLOYD W. MOULTRIE,
*Attorney for Los Angeles Harbor Company
and Imperial Investment Company.*

(Duly verified.)

Endorsed: Received copy of the within answer, this 5th day of Oct., 1909. Anderson & Anderson, attorneys for plff. Filed Oct. 8, 1909. C. G. Keyes, clerk; by W. T. McNeely, deputy.

67

[Title of Court and Cause.]

Amendment to Amended Answer of Banning Co. et al to Amended Complaint.

Now comes the defendant Banning Company, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, and by leave of court first had and obtained amend their amended answer to the amended complaint herein by adding thereto the following paragraph, to be designated paragraph X:

X.

And for a further and separate defense, defendants aver that their predecessor in interest, Phineas Banning, on or about the 15th day of February, 1866, was a citizen of the United States and a resident of the state of California, and in all respects duly qualified to purchase said land under and in virtue of the act of the legislature of California entitled "An act to provide for the sale of certain land belonging to the state," approved on the 27th day of April, 1863; and in conformity to the provisions of section 3 of said act, said Phineas Banning, on or about said 15th day of February, 1866, made and filed with the county surveyor of said Los Angeles county his application for the purchase of said land, and, in conformity to the provisions of section 7 of said act, caused a survey of said land to be made and the plat and field notes thereof to be completed

68 by the said county surveyor of said Los Angeles county, and paid therefor, on or about the 2nd day of April, 1866, a large sum of money to said surveyor as and for his legal fees; and that said Phineas Banning caused said plat and field notes, together with a copy of said application and affidavit, to be filed, and the same were filed by the said county surveyor in the office of the surveyor general of the state of California on or about said 15th day of February, 1866, in conformity to the provisions of said section 7 of said act; and said Phineas Banning, on or about said 15th day of February, 1866, took and subscribed the oath required by section 28 of said act, and in conformity to the provisions of section 29 of said act, a certificate of said oath was endorsed upon the description of said land and filed in the office of the county recorder of said county on the 11th day of March, 1866, and a certified copy thereof filed in the office of the state register on or about the 2nd day of April, 1866; and that by reason of the facts aforesaid the right to acquire the title to said land was vested in said Phineas Banning, and a contract was created between said Phineas Banning and the state of California whereby the said state agreed to sell to the said Phineas Banning the said land upon the terms provided for in and by said act of 1863; and that the said Phineas Banning fully complied with all of the terms and provisions of said act; and of all other acts of the legislature of said state

69 relating to or affecting the sale of said land; and thereafter, and by virtue of said application and the proceedings duly had thereon, a patent of the state of California to and for said land was duly executed and delivered to said Phineas Banning, and the title to said land thereby conveyed to and vested in said Phineas Banning was thereafter conveyed to and is now vested in said defendants; and that the plaintiff, in seeking by this action to deprive these defendants of the said land, is attempting to impair the obligations of the contract between the said state of California and their predecessor in interest, Phineas Banning, created as aforesaid, in violation of article One, section 10, of the Constitution of the United States.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for said Defendants.

(Duly verified.)

Endorsed: Received copy of the within this — day of —, 19—. Anderson & Anderson, attorneys for pl'ffs. Filed Nov. 4, 1909. C. G. Keyes, clerk; by Geo. O. Monroe, deputy.

[Title of Court and Cause.]

Amendment to Amended Answer of Banning Co. et al. to Amended Complaint.

Now come the defendants Banning Company, Mary H. Norris, Hancock Banning, and by leave of court first had and obtained amend their amended answer to the amended complaint herein by adding thereto the following paragraph, to be designated paragraph XI:

70

XI.

Defendants aver that on or about July 29th, 1908, the War Department of the United States government fixed and adopted in and for the inner harbor of San Pedro and Wilmington, in said county, harbor lines, both for bulk-heads and pier-heads, and that said lines are delineated on a map entitled "Map of San Pedro Harbor showing proposed harbor lines," and bearing the endorsement of the approval thereof by said War Department as follows: "War Department, July 29th, 1908. The harbor lines shown on this map are hereby approved and they supersede all harbor lines for San Pedro harbor previously established by the secretary of war. The systems of lines extending southward from stations 107 and 27 are established in accordance with the provisions of sec. II of the river and harbor act, approved March 3, 1899. The systems of lines for the inner harbor, extending westward from stations 25 and 30 and northward and westward from stations 27 and 107, are established in accordance with the joint resolution of congress, approved March 26, 1908, as follows: 'Resolved by the senate and house of representatives of the United States of America in congress assembled,

71 that the secretary of war is hereby authorized to fix and establish pier-head and bulk-head lines, either or both, in the inner harbor of San Pedro, otherwise known as Wilmington harbor, California, beyond which no piers, wharves, bulk-heads or other work shall be extended or deposits made except under such regulations as shall be prescribed from time to time by the secretary of war.' (Signed) Luke E. Wright, secretary of war."

And defendants aver that said harbor lines extend over and across and embrace a portion of said land of defendants; and defendants hereby offer to, and do hereby dedicate all of said land so embraced within said harbor lines, for channel purposes for the uses of navigation and fishery; reserving, however, the right to build and maintain wharves, docks and piers between said bulk-head and pier-head lines, subject to regulations made by law.

GIBSON, TRASK, DUNN & CRUTCHER,

Attorneys for Defendants.

(Duly verified.)

Endorsed: Received copy of the within this — day of —, 19—. Anderson & A. Filed Nov. 4, 1909. C. G. Keyes, clerk; by Geo. O. Monroe, deputy.

72 [Title of Court and Cause.]

Amendment to Amended Answer of Mary H. Banning and Lucy B. Greenleaf to Amended Complaint.

The defendants Mary H. Banning and Lucy B. Greenleaf, with leave of the court and with the consent of the plaintiff, now file this amendment to their amended answer herein, and for such amendment, and for further and separate defense aver.

I.

That the predecessors in interest of these defendants, to-wit, the applicants and patentees in the said answers herein named, at the time the said application was made, was a citizen of the United States and a resident of the state of California, and in all respects duly qualified to purchase said land under and by virtue of the acts of the legislature of the state of California providing for the sale and disposition of swamp and overflowed, salt marsh and tide lands, and in conformity to the provisions of the said acts the said application was made and accepted by the said state of California in accordance with the said acts. And thereupon the said applicant paid the necessary filing fees and expended large sums of money upon the faith thereof in making the surveys required by law; and thereafter the said surveys were duly approved and the purchase price paid,

73 and the certificate of purchase and patent issued as in the answer herein set forth. And by the said application, and the expenditure of the said money as aforesaid, a contract was created between the said applicant and the state of California whereby the said state agreed to sell to the said applicant the said land upon the terms provided in the said acts of the legislature, and which said terms were fully complied with by the said applicant. And thereafter, and by virtue of the said application and the proceedings duly had thereon, the patent of the state of California was issued to said applicant as in the said answer set forth, and the title to the said land thereby conveyed to and vested in the said predecessor in interest of these defendants. And the acts of the plaintiff in depriving defendants of the lands covered by the said patents, and any subsequent legislation attempting to rescind or repudiate the said contract would have the effect of impairing the obligation of the contracts between the said state and the predecessors in interest of these defendants, in violation of the constitution of the United States, article I, section 10, thereof, and to now divest these defendants of said lands will deprive them of their property without due process of law, and constitute an appropriation of the same for public purposes without just compensation having been made, in violation of the provisions of the constitution of the United States, and particularly of the 14th amendment thereto.

74 And for a further and separate defense, these defendants aver:

I.

That on or about the 29th of July, 1908, the war department of the United States government filed and adopted for the inner harbor of San Pedro and Wilmington, in said county, harbor lines both for bulkheads and pierheads, and said lines are delineated on a map of San Pedro harbor, showing the proposed harbor lines, and bearing the endorsement of the approval thereof by the war department as follows:

"WAR DEPARTMENT, July 29, 1908.

"The harbor lines shown on this map are hereby approved, and they supersede all harbor lines for San Pedro harbor previously es-

tablished by the secretary of war. The systems of lines extending southward from stations 107 and 27 are established in accordance with provisions of section 11 of the River and Harbor Act, approved March 3, 1899. The system of lines for the inner harbor extending westward from stations 25 and 30, and westward from station 27 and 170, are established in accordance with the joint resolution of congress approved March 26, 1908, as follows: 'Resolved, by the senate and house of representatives of the United States of America in congress assembled, that the secretary of war is hereby authorized to fix and establish pierhead and bulkhead lines either or both in the inner harbor of San Pedro, otherwise known as Wilmington harbor, California, beyond which no piers, wharves, bulkheads or other words shall be extended or deposits made except under such regulations as shall be prescribed from time to time by the secretary of war.'

(Signed)

"LUKE E. WRIGHT,
"Secretary of War."

Defendants dedicate all lands within said harbor lines for the purposes of navigation and fishing, reserving the right to build and maintain wharves, docks and piers between said bulkhead and pierhead lines, subject to the regulations made by law.

WARD CHAPMAN,
Attorney for said Defendants.

Verification waived.

ANDERSON & ANDERSON ET AL.,
Attorneys for Plaintiff.

The undersigned consent to filing the foregoing amendment to the answer herein, but without admitting the sufficiency of the facts therein set forth to constitute a defense, or the relevancy or materiality of such facts.

ANDERSON & ANDERSON ET AL.,
Attorneys for Plaintiff.

Endorsed: Filed Nov. 12, 1909. C. G. Keyes, clerk; by D. S. Burson, Jr., deputy.

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[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This cause came on regularly for hearing before the court sitting without a jury, Hon. U. S. Webb, attorney-general, and Messrs. A. P. Fleming, Leslie R. Hewitt and Anderson and Anderson appearing for the plaintiffs; and Messrs. Gibson, Trask, Dunn and Crutcher appearing for the Banning Company, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company; Lloyd W. Moultrie appearing for the Los Angeles Harbor Company and Imperial Investment Company and Ward Chapman appearing for Mary H. Banning, Lucy T. Greenleaf and Mace Greenleaf. Thereupon evi-

dence was introduced on behalf of the plaintiffs and the defendants and the cause submitted to the court for decision. The court having fully considered the same now renders its decision in favor of the plaintiffs and finds the following facts:

First. The allegations of paragraph II of the amended complaint are true.

Second. The state of California is the owner of all that parcel of land set forth and described in paragraph III of the amended complaint and known as location No. 57 of state tidelands in Los Angeles county, California, excepting those portions thereof lying north of the inner bay exception line as shown in the patent
77 and survey of the San Pedro rancho, which said patent is recorded in book 1, page 119 et seq., records of patents, Los Angeles county records, and excepting a small area of about eleven acres in the extreme west end of said parcel which lies above the line of ordinary high tide, and is a portion of the land claimed by Mary H. Banning in her answer herein.

That neither of the defendants has any estate, right, or title in or to any part of the said land which it is herein found is owned by the state of California.

Third. The whole of said land, other than the portions herein last above described as excepted from the said land owned by the state of California, is and at all times has been a portion of the bed of the inner bay of San Pedro and now lies and always has been below the line of ordinary high tide of said bay, and lies partly within the limits of the city of San Pedro and partly within the limits of the city of Wilmington, and the whole of said land since prior to 1870 has been within two miles of the cities or towns of San Pedro and Wilmington and no portion of said land is or ever has been reclaimable for agricultural or similar purposes, and the same has at all times been withheld from sale by the state of California.

Fourth. All the allegations of paragraph V of the amended complaint are true.

Fifth. The allegations of the several defendants as to
78 the application by Phineas Banning to purchase said lands and the reference by the surveyor-general of the contest between Phineas Banning and James McFadden, and as to the decision of said contest, and the judgment rendered thereon, and the subsequent proceedings had, and the payment by said Banning thereafter of the purchase price of said property, and the issuance of the patent to said lands to said Phineas Banning, are true, but the court finds that said patent was void and passed no title, and no title is vested in either of the defendants under said patent as to any of said land below ordinary high tide, and the state of California is not estopped by the said judgment or the said proceedings from claiming any interest, right, or title in or to the said lands, and the said judgment and the said patent and the said proceedings are not nor is either of them any bar to said claims on the part of the said plaintiffs or the state of California. The court further finds that neither by said judgment or by said decree or by the

subsequent proceedings thereunder were the matters herein in litigation finally or at all adjudicated or settled and the plaintiffs are not thereby debarred from prosecuting this action.

Sixth. The court further finds that the only improvements that have been placed upon said lands by the defendants herein is the construction of an electric railway by the Pacific Electric
79 Railway Company across said lands under deed dated August 14, 1903, which said railroad was constructed within five years prior to the beginning of this action, and the driving of certain piles by the Los Angeles Harbor Company, and certain dredging upon the lands claimed by them, which said works have never been completed by the said harbor improvement company and which were begun within two years prior to the commencement of this action.

Seventh. That it is not true that the plaintiffs are estopped to deny the right of the railroad corporations to continue the use of said land or the whole or any part thereof for the maintenance or operation of the said railroad.

Eighth. That it is not true that the plaintiffs were not seized or possessed of said lands and the whole thereof within five years next preceding the commencement of this action.

Ninth. That said cause of action as set forth in the complaint is not barred by the provisions of sections 312, or 315 or 316 or 317 or 319 or 318 of the Code of Civil Procedure or by either thereof.

Tenth. That the allegation as to the execution of the instrument set forth in the answer of the defendants Los Angeles Harbor Improvement Company and Imperial Investment Company and purporting to be a lease from the city of Wilmington, and as to the location of the lands described in said lease, are true, but
80 the court finds that said city did not by said instrument lease to the said defendant Imperial Investment Company, a corporation, the lands therein described; on the contrary, this court finds that the said lease was inoperative and void.

It is not true that either of the defendants has been in the exclusive or continuous, or open or notorious possession of any part of said premises, for any period of time, or that their predecessor has been in such possession thereof.

As conclusions of law the court finds:

That the plaintiffs are entitled to the decree that the state of California is the owner of all of said lands described in the complaint excepting the portions referred to in the second finding herein.

And that the defendants have not nor has either of them any estate, right or title therein; and that plaintiffs are entitled to their costs.

Dated —, 1911.

WALTER BORDWELL,
Judge of Superior Court.

Endorsed: Filed Feb. 20, 1911. H. J. Lelande, clerk; by J. A. Campbell, deputy.

[Title of Court and Cause.]

Judgment.

This cause came on regularly to be heard before the court sitting without a jury; U. S. Webb, attorney general, and
 81 Messrs. A. P. Fleming, Leslie R. Hewitt and Anderson and Anderson appearing for the plaintiffs; and Messrs. Gibson, Trask, Dunn and Crutcher appearing for the Banning Company, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company; Lloyd Moultrie appearing for the Los Angeles Harbor Company and Imperial Investment Company, and Ward Chapman appearing for Mary H. Banning, Lucy T. Greenleaf and Mace Greenleaf. Thereupon said cause was tried and submitted, and the court having rendered its decision and filed its findings of fact and conclusions of law in favor of the plaintiff does now order, adjudge and decree.

That the state of California is the owner of all that portion of tide land location No. 57 described in the complaint and being the same premises set forth and described in the document purporting to be a patent from the state of California to Phineas Banning and recorded in book 3, page 46 of patents, records of Los Angeles county, California, which is particularly described as follows, to-wit:

Beginning at a 4"x4" stake marking a point on the line between the Rancho Los Palos Verdes and Rancho San Pedro and being the common corner to the inner bay exception and of lot L of the partition of the said Rancho Los Palos Verdes, Superior Court case
 2373, Bixby v. Bent, and described as "a white post 4 inches
 82 square marked P V S P 24 standing on the shore of the inner bay of San Pedro at the common corner of the Rancho Palos Verdes and San Pedro;" thence along the shore of the inner bay which is the boundary of the Rancho Palos Verdes S. 64 degrees 41 minutes W. a distance of five hundred thirteen and three hundredths (513.03) feet to a point; thence S. 11 degrees 45 minutes W. a distance of one hundred forty-one and nine-tenths (141.9) feet to a point; thence N. 67 degrees W. a distance of two hundred fourteen and five-tenths (214.5) feet to a stake four (4) inches square marking the common corner of lots K and L of the said partition of Rancho Los Palos Verdes; thence following the easterly line of said lot K S. 9 degrees 24 minutes 30 seconds E. a distance of three hundred fifty-six and seventy-two hundredths (356.72) feet to a stake four (4) inches square; thence S. 23 degrees 17 minutes 30 seconds W. a distance of two hundred eighty-five and fifty-eight hundredths (285.58) feet to a stake four (4) inches square; thence S. 36 degrees 43 minutes 30 seconds E. a distance of four hundred sixty-nine and forty hundredths (469.40) feet to a stake four (4) inches square; thence S. 21 degrees 09 minutes 30 seconds E. a distance of ten hundred thirty-seven and twenty-two hundredths (1037.22) feet to a stake four (4) inches

- square; thence S. 41 degrees 39 minutes 30 seconds E. a distance of one hundred twenty-six and eighty-one hundredths (126.81) feet to a stake 4" square; thence S. 14 degrees 07 minutes 30 seconds E. a distance of two hundred thirty and sixty-six hundredths (230.63) feet to a stake four (4) inches square; thence S. 9 degrees 24 minutes 30 seconds W. a distance of seven hundred ninety-two and fifty-five hundredths (792.55) feet to a stake four (4) inches square; thence S. 29 degrees 50 minutes 30 seconds W. a distance of four hundred forty-nine and sixty-nine hundredths (449.69) feet to a stake four (4) inches square; thence S. 56 degrees 16 minutes 30 seconds W. a distance of five hundred eighty-two and twenty-eight hundredths (582.28) feet to a stake four (4) inches square; thence leaving the easterly line of said lot K, S. 52 degrees 19 minutes 25 seconds W. a distance of seven hundred seventy-five and forty-six hundredths (775.46) feet to a point; thence S. 3 degrees 04 minutes E. a distance of two hundred eighty and forty hundredths (280.40) feet to a point; thence N. 83 degrees 43 minutes 50 seconds W. a distance of four hundred fifty-seven and seventy-four hundredths (457.74) feet to a point; thence S. 56 degrees 18 minutes 40 seconds W. a distance of three hundred seventy-eight and fifty-six hundredths (378.56) feet to a point; thence N. 45 degrees W. a distance of three hundred twenty-five and twenty-seven hundredths (325.27) feet to a point; thence S. 49 degrees 05 minutes 10 seconds W. a distance of one hundred ninety-eight and forty-nine hundredths (198.49) feet to a point; thence S. 7 degrees 49 minutes 45 seconds W. a distance of eight hundred seven and fifty-three hundredths (807.53) feet to a point; thence S. 37 degrees 28 minutes 35 seconds E. a distance of two hundred thirty-three and thirty-three hundredths (233.33) feet to a point on the southerly line of tide land location 57; thence following the southerly and easterly lines of said tide land location 57 N. 58 degrees 08 minutes E. a distance of eight thousand one hundred twenty and no hundredths (8120.00) feet to a point; thence N. 76 degrees 50 minutes E. a distance of two thousand seven hundred and six hundredths (2700.06) feet to a point; thence north a distance of one thousand six hundred seventy-two and nine-tenths (1672.9) feet to a point in the northerly line of the inner bay exception; thence following said exception line S. 58 degrees 24 minutes W. a distance of sixty-five and thirty-nine hundredths (65.39) feet to a stake four (4) inches square; thence S. 69 degrees 57 minutes W. a distance of seven hundred fifty-six and twenty hundredths (756.20) feet to a stake four (4) inches square; thence S. 46 degrees 43 minutes W. a distance of seven hundred fifty-six and twenty hundredths (756.20) feet to a stake four (4) inches square; thence S. 24 degrees 47 minutes 30 seconds W. a distance of nine hundred twenty-nine and ten hundredths (929.10) feet to a stake four (4) inches square; thence N. 67 degrees 56 minutes 30 seconds W. a distance of one thousand fifty-three and seventy-two hundredths (1053.72) feet to a stake four (4) inches square; thence N. 72 degrees 05 minutes W. a distance of nine hundred

eighty-seven and twenty-four hundredths (987.24) feet to a stake four (4) inches square; thence N. 0 degrees 39 minutes E. a distance of four hundred thirty-one and forty-seven hundredths (431.47) feet to a stake four (4) inches square; thence N. 77 degrees 30 minutes 30 seconds W. a distance of five hundred eighty-four and sixty-three hundredths (584.63) feet to a stake four (4) inches square; thence S. 76 degrees 54 minutes 30 seconds W. a distance of one thousand six hundred forty-four and ten hundredths (1644.10) feet to a stake four (4) inches square; thence N. 87 degrees 16 minutes 30 seconds W. a distance of five hundred eighty-seven and forty-three hundredths (587.43) feet to a stake four (4) inches square; thence N. 82 degrees 36 minutes 30 seconds W. a distance of seven hundred fifteen and five hundredths (715.05) feet to the point of beginning; containing four hundred thirty-five and fifty-three hundredths (435.53) acres, and situated in Los Angeles county, California.

86 That defendants have not nor has either of them any estate, right, title or interest therein.

It is further adjudged that the plaintiffs recover of the defendants their costs taxed at \$31.00/100.

Dated —, 1911.

WALTER BORDWELL,
Judge of Superior Court.

Endorsed: Filed Feb. 20, 1911. H. J. Lelande, clerk; by J. A. Campbell, deputy. Docketed Feb. 23, 1911; entered Feb. 23, 1911; book 221, page 50; by G. E. Ross, deputy clerk.

[Title of Court and Cause.]

Bill of Exceptions of Banning Co. et al. on Motion to Strike Out Complaint.

Be it remembered that on the 19th day of October, 1908, plaintiffs filed their complaint herein, which said complaint, omitting the title of court and cause, was in words and figures following:

(Title of Court and Cause.)

Plaintiff complains of the defendants and alleges:

I.

That the defendants Banning Company, Pacific Electric Company, Los Angeles Harbor Company, Imperial Investment Company, Kerckhoff-Cuzner Mill & Lumber Company and the California Pacific Railway Company, are, and each of said defendants is a corporation organized and existing under and by virtue of the laws of the state of California, and having its principal place of business respectively in the city of Los Angeles, county of Los Angeles, state of California.

II.

That on September 9, 1850, when the state of California was admitted into the Union, the boundaries of said state embraced, and the same now embraces, that certain navigable bay known at that time as Wilmington bay or lagoon, and sometimes known as the inner harbor of San Pedro in Los Angeles county, California, being an inlet of the Pacific ocean, and including all the shores, arms and estuaries and tide-lands of said bay and the channel connecting said bay with the Pacific ocean, and said bay and its said arms, estuaries and channels are, and at all times have been navigable waters of said state and of the United States.

III.

That said state of California owns the soils and land of the bed of said bay and the tide lands thereof, and all lands of said bay that are covered and uncovered by the flux and reflux of the tides, absolutely and completely, subject only to the right of the United States to supervision over the navigable waters of said bay for the purposes of regulating commerce with foreign nations and among the states.

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IV.

The lands owned by the state of California and affected by this suit are the lands permanently covered by the waters of said bay, and including the shores of said bay covered and uncovered by the flux and reflux of the tides of said bay, and said lands embraced in this suit are more particularly described as follows, to wit:

Being all those lands that lie within the following lines, to wit:

Beginning at a point formerly called "Las Barilas" or Barrel Springs, said point being 27.73 chains S. and 41.88 chains E. of the section corner to Sects. 1 and 6 on first standard parallel S. of San Bernardino base line, T. 5 S., ranges 13 and 14 west, and running thence

N. 86° E. 7.30 chains; thence

S. $77\frac{3}{4}^{\circ}$ E. 10.46 chains; thence

N. $77\frac{1}{4}^{\circ}$ E. 32 chains; thence

S. $65\frac{1}{4}^{\circ}$ E. 7 chains; thence

S. 11° W. 5.50 chains; thence

S. $72\frac{3}{4}^{\circ}$ E. 15.75 chains; thence

S. $67\frac{1}{4}^{\circ}$ E. 17 chains; thence

N. 71° E. 2.48 chains; thence

N. $13\frac{1}{2}^{\circ}$ E. 12.21 chains; thence

N. $47\frac{1}{2}^{\circ}$ E. 6.38 chains; thence

N. 21° E. 5.04 chains; thence

N. $56\frac{1}{2}^{\circ}$ E. 9 chains; thence in a direct line and in an easterly direction to the northeasterly corner of the lands covered by

89 water excepted from the patent of the Rancho San Pedro, as described in United States patent of said rancho recorded in book 1 of patents, page 105, records of Los Angeles county, thence

south 30° east to the southeasterly corner of the 66.69 acre tract described in that certain document purporting to be a patent from the state of California to William Banning and recorded in book 9 of patents, page 274, records of Los Angeles county, thence S. 67° W. 76.50 chains; thence S. $34\frac{3}{4}^{\circ}$ W. 46.60 chains; thence S. 72° W. to station No. 3 of the survey of the 1.56 acre tract described in that certain document purporting to be a patent from the state of California to W. B. Nicholson, and recorded in book 4 of patents, page 554, records of Los Angeles county, thence S. $21\frac{1}{2}^{\circ}$ E. 2.04 chains to station No. 2 of said survey, thence south 66° W. to a point where the southerly line of said survey intersects a line projected north $34\frac{3}{4}^{\circ}$ E. from station 25 of the exterior boundaries of the survey of the Rancho San Pedro above mentioned, thence S. $34\frac{3}{4}^{\circ}$ W. to said station 25, thence in a direct line from said station 25 crossing the channel or entrance to said bay to the northeasterly corner of the 12.83 acre tract described in that certain document purporting to be a patent from the state of California to P. C. Learned and recorded in book 3 of patents, page 100, records of

Los Angeles county, thence along the northern line of said
90 Learned tract N. $71\frac{1}{2}^{\circ}$ west 19.05 chains; thence along the line of high tide N. $49\frac{3}{4}^{\circ}$ W. 7.25 chains, thence

N. $79\frac{3}{4}^{\circ}$ W. 3.40 chains; thence

N. $38\frac{3}{4}^{\circ}$ W. 2.77 chains; thence

N. $64\frac{3}{4}^{\circ}$ W. 9.41 chains, thence

N. $40\frac{1}{4}^{\circ}$ E. 4.81 chains, thence

N. $21\frac{3}{4}^{\circ}$ W. 3.98 chains, thence

N. 77° W. 8.04 chains, thence

S. $67\frac{1}{4}^{\circ}$ W. 14.10 chains to a point on the range line between ranges 13 and 14 west, township 5 south, thence along said range line to a point 30.11 chains north of the southeast corner of section 12 T. 5 S. R. 14 W., S. B. M., thence

N. $57\frac{3}{4}^{\circ}$ W. 6.08 chains, thence

N. 59° W. 11.82 chains, thence

N. 32° W. 11.65 chains, thence

N. $18\frac{1}{4}^{\circ}$ E. 5.35 chains, thence

N. $70\frac{1}{4}^{\circ}$ E. 13.91 chains, thence

N. $67\frac{1}{2}^{\circ}$ E. 7.19 chains to a point on the range line between said ranges 13 and 14 west 1.24 chains south of base of bluff, thence along said range line to a point on same which is 17.88 chains south of the corner common to sections 6 and 7 of range 13 and sections 1 and 12 of range 14, township 5 south,

thence N. 72° E. 4.55 chains,

thence S. $62\frac{1}{4}^{\circ}$ E. 7.50 chains,

thence S. 70° E. 3.70 chains,

thence N. $44\frac{1}{2}^{\circ}$ E. 6.27 chains,

thence N. 24° W. 2.87 chains,

91 thence N. $76\frac{1}{2}^{\circ}$ E. 3 chains,

thence N. $5\frac{1}{2}^{\circ}$ E. 1.81 chains,

thence east 2.50 chains,

thence S. 10° E. 3.60 chains,

thence S. 78° E. 0.70 chains,

thence N. 53° E. 6.50 chains,
 thence N. 46° E. 8.16 chains,
 thence N. 28½° E. 4.50 chains,
 thence N. 19° E. 3.75 chains,
 thence N. 9° E. 8.70 chains,
 thence N. 11° W. 4.85 chains,
 thence S. 66° W. 3.15 chains,
 thence N. 12° E. 4.50 chains,
 thence N. 4° W. 2 chains,
 thence N. 52½° W. 1.57 chains,
 thence N. 14½° W. 3 chains,
 thence N. 19° W. 1.50 chains,
 thence N. 43° W. 120 chains,
 thence S. 78° W. 2.65 chains,
 thence N. 16° E. 4 chains,
 thence N. 23½° W. 1.50 chains,
 thence N. 63° W. 1.50 chains,
 thence N. 20° W. 3 chains,
 thence S. 62½° W. 1.41 chains,
 thence N. 14° W. 2.40 chains,
 thence N. 22½° E. 11.50 chains and
 thence N. 61° E. 11 chains to the point of beginning, run by
 true meridian (the variation of the magnetic needle being
 92 14½° east), all being situated in the county of Los Angeles,
 state of California.

Excepting, however, from the above description and from this
 suit, those two certain islands lying within said bay known as
 "Mormon Island" and "Smith's Island," and described respectively
 as lot 1 of section 8 and lot 2 of section 7 of township 5 south,
 range 13 west, S. B. M.

That said lands are situated partly within the limits of the city of
 San Pedro, partly within the limits of the city of Wilmington, partly
 within the limits of the city of Long Beach and partly within the
 limits of the city of Los Angeles, all within the county of Los An-
 geles, state of California.

That all of said lands since the first founding of the towns of San
 Pedro and Wilmington—that is to say, since prior to 1860—have
 been within two miles of each of said towns.

V.

That the defendants herein each claims an interest in said lands,
 or some portion thereof, adverse to the plaintiffs, which said claims
 are and each of them is without any validity or right whatever;
 and said claims of the defendants, and of each of them, are based
 upon various invalid state patents issued since 1880 in violation of
 the Constitution and laws of the state of California, and purporting
 to convey portions of said land and to be issued under alleged
 93 authority of the laws of the state providing for the sale of
 swamp and overflowed, salt-marsh "and tide-lands."

VI.

That the subject matter of this suit is an entire and unseverable property constituting a navigable bay and its shores, and each and all of the defendants are made parties to this action to avoid a multiplicity of suits.

VII.

That the true names of the defendants John Doe, Richard Roe, Mary Doe, Mary Roe, John Styles and Mary Styles are unknown to plaintiff and for that reason they are sued by said fictitious names, and leave of court is asked to insert the true names of said defendants when they are ascertained.

Wherefore plaintiff prays that said defendants and each of them be required to set forth their several claims to said land, and that such claims and each of them be adjudged to be illegal and without validity, and that the state of California be adjudged to be the owner of said land and the whole thereof; and for costs and general relief

U. S. WEBB,

Attorney General of the State of California.

A. P. FLEMING,

ANDERSON & ANDERSON,

Attorneys for Plaintiff.

LESLIE R. HEWITT,

Att'y of Los Angeles, of Counsel.

94 Thereafter, on the 5th day of November, 1908, defendants Banning Company, William Banning, Joseph B. Banning, Hancock Banning, Mary H. Norris, Pacific Electric Railway Company, the California Pacific Railway Company, served on plaintiffs and filed herein their notice of motion to dismiss said complaint, which said notice of motion, omitting the title of the court and cause, is in words and figures following:

(Title of Court and Cause.)

To Plaintiffs and their attorneys, U. S. Webb, Esq., Attorney General of California, A. P. Fleming, Esq., Messrs. Anderson & Anderson, and Leslie R. Hewitt, Esq., City Attorney of Los Angeles:

You will please take notice that Banning Company, William Banning, Joseph B. Banning, Hancock Banning, Mary H. Norris, Pacific Electric Railway Company, the California Pacific Railway Company, defendants in the above entitled action, severing from their co-defendants therein, will at the court room of department 9 of said Superior Court in the court house in the city of Los Angeles, in said Los Angeles county, on Friday, the 20th day of November, 1908, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, move the court to dismiss said action as against these defendants, on the ground that the people of the state of California and the

95 attorney general of said state have not, nor has either the people of the state of California or the said attorney general any power or authority to commence or maintain or prosecute said action against these defendants or any of them.

Said motion will be based upon the complaint, papers, files and records of said action.

GIBSON, TRASK, DUNN &
CRUTCHER,

Attorneys for Defendants, Banning Company, William Banning, Joseph B. Banning, Hancock Banning, Mary H. Norris, Pacific Electric Railway Company, the California Pacific Railway-Company.

That thereafter, to wit on the 15th day of January, 1909, said motion came on regularly to be heard, plaintiffs and defendants being represented by their respective attorneys, and said motion was then made by said defendants to dismiss said complaint, upon the grounds stated in said notice of said motion, and said motion was thereupon argued and submitted to the court for decision; and thereafter, after due consideration of said motion, by the court, to wit, on the 22nd day of April, the court denied said motion, to which defendants and each of them then and there duly excepted; and the court thereupon made an order that said defendants should have twenty days from said 22nd day of April, to prepare and serve their bill of exceptions upon said motion, and the ruling thereon and the exception thereto. Said defendants present
96 and ask to have this bill of exceptions settled and allowed as true and correct, and made a part of the records and files of said action.

Dated this 4 day of May, 1909.

GIBSON, TRASK, DUNN & CRUTCHER,
Attorneys for said Defendants.

Service of the foregoing bill of exception is admitted by receipt of copy this 6th day of May, 1909, and amendments waived.

ANDERSON & ANDERSON ET AL.,
Attorneys for Plaintiffs.

The foregoing bill of exceptions is settled and allowed as correct, this 11 day of May, 1909.

WALTER BORDWELL, *Judge.*

Endorsed: Filed May 11, 1909. C. G. Keyes, clerk; by Geo. O. Monroe, deputy.

(Title of Court and Cause.)

Bill of Exceptions of Mary H. Banning et al. on Motion to Strike Out Complaint.

Be it remembered that on the 19th day of October, 1908, plaintiffs filed their complaint herein, which said complaint, omitting the title of the court and cause, was in words and figures following:

97

(Title of Court and Cause.)

Plaintiff complains of the defendants, and alleges:

I.

That the defendants Banning Company, Pacific Electric Company, Los Angeles Harbor Company, Imperial Investment Company, Kerckhoff-Cuzner Mill & Lumber Company and the California Pacific Railway Company are, and each of said defendants is, a corporation organized and existing under and by virtue of the laws of the state of California, and having its principal place of business respectively in the city of Los Angeles, county of Los Angeles, state of California.

II.

That on September 9, 1850, when the state of California was admitted into the Union, the boundaries of said state embraced, and the same now embrace, that certain navigable bay known at that time as Wilmington bay or lagoon, and sometimes known as the inner harbor of San Pedro in Los Angeles county, California, being an inlet of the Pacific ocean, and including all the shores, arms and estuaries and tide lands of said bay and the channel connecting said bay with the Pacific ocean, and said bay and its said arms, estuaries and channels are, and at all times have been navigable waters of said state and of the United States.

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III.

That said state of California owns the soils and land of the bed of said bay and the tide lands thereof, and all lands of said bay that are covered and uncovered by the flux and reflux of the tides, absolutely and completely, subject only to the right of the United States to supervision over the navigable waters of said bay for the purposes of regulating commerce with foreign nations and among the states.

IV.

The lands owned by the state of California and affected by this suit are the lands permanently covered by the waters of said bay, and including the shores of said bay covered and uncovered by the flux and reflux of the tides of said bay, and said lands embraced in this suit are more particularly described as follows, to wit:

Being all those lands that lie within the following lines, to wit:

Beginning at a point formerly called "Las Barriles" or Barrel Springs, said point being 27.73 chains S. and 41.88 chains E. of the section corner to sects. 1 and 6 on first standard parallel S. of San Bernardino base line, T. 5 S., ranges 13 and 14 west; and running thence

N. 86° E. 7.30 chains; thence

S. $77\frac{3}{4}^{\circ}$ E. 10.46 chains; thence

N. $77\frac{1}{4}^{\circ}$ E. 32 chains; thence

S. $65\frac{1}{4}^{\circ}$ E. 7 chains; thence

99 S. 11° W. 5.50 chains; thence

S. $72\frac{3}{4}^{\circ}$ E. 15.75 chains; thence

S. $67\frac{1}{4}^{\circ}$ E. 17 chains; thence

N. 71° E. 2.48 chains; thence

N. $13\frac{1}{2}^{\circ}$ E. 12.21 chains; thence

N. $47\frac{1}{2}^{\circ}$ E. 6.38 chains; thence

N. 21° E. 5.04 chains; thence

N. $56\frac{1}{2}^{\circ}$ E. 9 chains; thence in a direct line and in an easterly direction to the northeasterly corner of the tract of tide land excepted from the patent of the Rancho San Pedro, as described in United States patent of said rancho recorded in book 1 of patents, page 105, records of Los Angeles county; thence south 34° east to the southeasterly corner of the 66.69 acre tract described in that certain document purporting to be a patent from the state of California to William Banning, and recorded in book 9 of patents, page 274, records of Los Angeles county; thence S. 67° W. 76.50 chains; thence S. $34\frac{3}{4}^{\circ}$ W. 46.60 chains; thence S. 72° W. to station No. 3 of the survey of the 1.53 acre tract described in that certain document purporting to be a patent from the state of California to W. B. Nicholson and recorded in book 4 of patents, page 554, records of Los Angeles county; thence S. $21\frac{1}{2}^{\circ}$ E. 2.04 chains to station No. 2 of said survey; thence south 68° W. to a point where the southerly line of said survey intersects a line projected north $34\frac{3}{4}^{\circ}$ E. from station 25 of the exterior boundaries of the survey of the

100 rancho San Pedro above mentioned; thence S. $34\frac{3}{4}^{\circ}$ W. to said station 25; thence in a direct line from said station 25 crossing the channel or entrance to the said bay to the northeasterly corner of the 12.83 acre tract described in that certain document purporting to be a patent from the state of California to P. C. Learned and recorded in book 3 of patents, page 100, records of Los Angeles county; thence along the northern line of said Learned Tract N. $71\frac{1}{2}^{\circ}$ west 19.05 chains; thence along the line of high tide N. $49\frac{3}{4}^{\circ}$ W. 7.25 chains; thence

N. $79\frac{3}{4}^{\circ}$ W. 3.40 chains; thence

N. $38\frac{3}{4}^{\circ}$ W. 277 chains; thence

N. $64\frac{3}{4}^{\circ}$ W. 9.41 chains; thence

N. $40\frac{1}{4}^{\circ}$ E. 4.81 chains; thence

N. $21\frac{3}{4}^{\circ}$ W. 3.98 chains; thence

N. 77° W. 8.04 chains; thence

S. $67\frac{1}{4}^{\circ}$ W. 14.10 chains to a point on the range line between ranges 13 and 14 west, township 5 south; thence along said range

line to a point 30.11 chains north of the southeast corner of section 12 T. 5 S., R. 14 W., S. B. M.; thence

N. $57\frac{3}{4}^{\circ}$ W. 6.08 chains; thence

N. 59° W. 11.82 chains; thence

N. 32° W. 11.65 chains; thence

N. $18\frac{1}{2}^{\circ}$ E. 5.35 chains; thence

N. $70\frac{1}{4}^{\circ}$ E. 13.91 chains; thence

N. $67\frac{1}{2}^{\circ}$ E. 7.19 chains to a point on the range line between said ranges 13 and 14 west, 1.24 chains south of base of bluff;

101 thence along said range line to a point on same which is 17.88 chains south of the corner common to sections 6 and 7 of range 13, and sections 1 and 12 of range 14, township 5 south;

thence N. 72° E. 4.55 chains;

thence S. $62\frac{1}{4}^{\circ}$ E. 7.50 chains;

thence S. 70° E. 3.70 chains;

thence N. $44\frac{1}{2}^{\circ}$ E. 6.27 chains;

thence N. 24° W. 2.87 chains;

thence N. $76\frac{1}{2}^{\circ}$ E. 3 chains;

thence N. $5\frac{1}{2}^{\circ}$ E. 1.81 chains;

thence east 2.50 chains;

thence S. 10° E. 3.60 chains;

thence S. 78° E. 0.70 chains;

thence N. 53° E. 6.50 chains;

thence N. 46° E. 8.16 chains;

thence N. $28\frac{1}{2}^{\circ}$ E. 4.50 chains;

thence N. 19° E. 3.75 chains;

thence N. 9° E. 8.70 chains;

thence N. 11° W. 4.85 chains;

thence S. 66° W. 3.15 chains;

thence N. 12° E. 4.50 chains;

thence N. 4° W. 2 chains;

thence N. $52\frac{1}{2}^{\circ}$ W. 1.57 chains;

thence N. $14\frac{1}{2}^{\circ}$ W. 3 chains;

thence N. 19° W. 1.50 chains;

thence N. 43° W. 1.20 chains;

thence S. 78° W. 2.65 chains;

thence N. 16° E. 4 chains;

102 thence N. $23\frac{1}{2}^{\circ}$ W. 1.50 chains;

thence N. 63° W. 1.50 chains;

thence N. 20° W. 3 chains;

thence S. $62\frac{1}{2}^{\circ}$ W. 1.41 chains;

thence N. 14° W. 2.40 chains;

thence N. $22\frac{1}{2}^{\circ}$ E. 11.50 chains; and

thence N. 61° E. 11 chains to the point of beginning, run by true meridian (the variation of the magnetic needle being $14\frac{1}{2}^{\circ}$ East), all being situated in the county of Los Angeles, state of California.

Excepting, however, from the above description and from this suit, those two certain islands lying within said bay known as "Mormon Island" and "Smith's Island," and described respectively as lot 1 of section 8, and lot 2 of section 7, of township 5 south, range 13 west, S. B. M.

That said lands are situate partly within the limits of the city of San Pedro, partly within the limits of the city of Wilmington, partly within the limits of the city of Long Beach and partly within the limits of the city of Los Angeles, all within the county of Los Angeles, state of California.

That all of said lands since the first founding of the towns of San Pedro and Wilmington—that is to say, since prior to 1860—have been within two miles of each of said towns.

V.

103 That the defendants herein each claims an interest in said lands, or some portion thereof, adverse to the plaintiff, which said claims are and each of them is without any validity or right whatever; and said claims of the defendants, and of each of them, are based upon various invalid state patents issued since 1880 in violation of the constitution and laws of the state of California, and purporting to convey portions of said lands and to be issued under alleged authority of the laws of the state providing for the sale of swamp and overflowed, salt marsh "and tide lands."

VI.

That the subject-matter of this suit is an entire and unseverable property constituting a navigable bay and its shores, and each and all of the defendants are made parties to this action to avoid a multiplicity of suits.

That the true names of the defendants John Doe, Richard Roe, Mary Doe, Mary Roe, John Styles and Mary Styles are unknown to plaintiff, and for that reason they are sued by said fictitious names, and leave of court is asked to insert the true names of said defendants when they are ascertained.

Wherefore, plaintiff prays that said defendants and each of them be required to set forth their several claims to said land, and that such claims and each of them be adjudged to be illegal and without validity, and that the state of California be adjudged to be
104 the owner of said land and the whole thereof; and for costs and general relief.

U. S. WEBB,

Attorney-General of the State of California;

A. P. FLEMING,

ANDERSON & ANDERSON,

Attorneys for Plaintiff.

LESLIE R. HEWITT,

City Att'y of Los Angeles,

Of Counsel.

Thereafter, to-wit, on the 11th day of November, 1908, the defendants Mary H. Banning, Lucy T. Greenleaf and Mace Greenleaf, her husband, served on plaintiffs and filed herein their notice of motion to dismiss said complaint, which said notice of motion,

omitting the title of the court and cause, was in words and figures following:

[Title of Court and Cause.]

To the Plaintiffs and Their Attorneys, U. S. Webb, Esq., Attorney-General of California; A. P. Fleming, Esq., Messrs. Anderson & Anderson and Leslie R. Hewitt, Esq., City Attorney of Los Angeles:

You will please take notice that the defendants, Mary H. Banning, Lucy T. Greenleaf and Mace Greenleaf, severing from their co-defendants in the above-entitled action, will, at the court room of department 9 of said Superior Court in the court house in the city of Los Angeles, in the said Los Angeles county, on Friday, the 20th day of November, 1908, at ten o'clock a. m., or as soon
105 thereafter as counsel can be heard, move the court to dismiss said action as against these defendants, on the ground that the people of the state of California and the attorney-general of said state have not, nor has either the people of the state of California or the said attorney-general any power or authority to commence or maintain or prosecute said action against these defendants, or any of them.

Said motion will be based upon the complaint, papers, files and records of said action.

WARD CHAPMAN,

*Attorney for Def^{ts} Mary H. Banning, Lucy T.
Greenleaf, and Mace Greenleaf, Her Husband.*

Thereafter, to-wit, on the 18th day of January, 1909, said motion came on regularly to be heard, plaintiffs and defendants being represented by their respective attorneys, and said motion was then made by said defendants to dismiss said complaint upon the grounds stated in said notice of motion, and said motion was thereupon argued and submitted to the court for decision.

And thereafter, after due consideration of said motion by the court, to-wit, on the 22nd day of April, 1909, the court denied said motion, to which defendants and each of them then and there duly excepted.

And the court thereupon made an order that said defend-
106 ants should have 20 days from said 22nd day of April, 1909, to prepare and serve their bill of exceptions upon said motion from the ruling thereon, and exceptions thereto.

Said defendants present and ask to have this bill of exceptions settled and allowed as true and correct, and made a part of the records and files of said action.

Dated, May —.

WARD CHAPMAN,

Attorney for said Defendants.

Service of the foregoing bill of exceptions is admitted by receipt of copy this 12 day of May, 1909, and amendments waived.

ANDERSON & ANDERSON ET AL.,
Attorneys for Plaintiff.

The foregoing bill of exceptions is settled and allowed as correct this 18 day of May, 1909.

WALTER BORDWELL, *Judge.*

Endorsed: Filed May 18, 1909. C. G. Keyes, clerk; by E. G. Riggins, deputy.

[Title of Court and Cause.]

Clerk's Certificate to Judgment Roll.

H. J. Lelande, county clerk of the county of Los Angeles, state of California, and ex-officio clerk of the Superior Court in and for said county, do hereby certify the foregoing to be a true
107 copy of the judgment entered in the above-entitled action,
and recorded in judgment book 221 of said court, at page
50. And I further certify that the foregoing papers, hereto annexed, constitute the judgment roll in said action.

Witness my hand and the seal of said Superior Court this 23 day of Feb., A. D. 1911.

[SEAL.]

H. J. LELANDE, *Clerk,*
By IRVING BAXTER, *Deputy.*

Judgment roll filed and entered Feb. 23, 1911, in book 221, page 50, H. J. Lelande, clerk; by Irving Baxter, deputy.

[Title of Court and Cause.]

Statement of Case on Motion for New Trial.

This cause came on regularly to be heard on the — day of October, 1909, before the court without jury, U. S. Webb, Attorney General, Messrs. Anderson & Anderson, A. P. Fleming, Esq., and Leslie R. Hewitt, Esq., of counsel, appearing for the plaintiffs, and Messrs. Gibson, Trask, Dunn & Crutcher, Lloyd W. Moultrie, Esq., Ward Chapman, Esq., J. W. McKinley, Esq., and Frank Karr, Esq., appearing as attorneys for the defendants; and the following proceedings were thereupon had.

COUNSEL FOR DEFENDANTS: We desire to make the general objection to any evidence being received in this case on the ground
108 that the amended complaint does not state facts sufficient to constitute a cause of action against the defendants or any of them.

The COURT: Objection overruled.

COUNSEL FOR DEFENDANTS: Exception.

Mr. ANDERSON: In connection with the testimony of Mr. E. W. Merwin, the plaintiffs will offer as Exhibit A in this case, the map introduced as Diagram A in case No. 64535. And the same is offered simply as a diagram and not for the purpose of definitely establishing lines.

(Said Exhibit A is found on page 1, Book of Maps, filed herewith as a part of this statement.)

Mr. GIBSON: Defendants object to the introduction in evidence of said map or diagram, as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Mr. ANDERSON: We offer as Exhibit B in this case, blue print of a map which is a portion of the Palos Verdes Rancho patent, showing the exterior boundary lines of the rancho along the inner bay of San Pedro, for the purpose of indicating where the old line of high tide ran. We offer also in connection with this the patent of Palos Verdes Rancho.

The patent referred to calls for the line of ordinary high tide as to the boundary of the grant from Sepulveda's Landing, which is identical with Timm's Point, northerly to the point on the
109 north side of said Wilmington Bay near Las Barillas, where the line of the Palos Verdes grant intersects the westerly line of the Rancho San Pedro. Said patent is dated the 22 day of June, 1880, and is introduced solely for the purpose of showing that said patent calls for the ordinary high tide line as to the easterly boundary between said points.

Mr. MCKINLEY: Defendants object to the introduction of the map as immaterial, irrelevant not tending to show the location of the high tide line, not binding in any way upon the defendants, and as incompetent and not the best evidence. We are not objecting to it as a copy, and it can be treated as an original record.

The COURT: Objection overruled.

(Said Exhibit B is found on page 3 of said Book of Maps.)

Mr. ANDERSON: We offer now as Exhibit C the preliminary chart of San Pedro Harbor, issued by the United States Coast and Geodetic Survey, based upon the survey of 1859. One purpose is to show the shore line in the early days.

Mr. MCKINLEY: The defendants object to it as incompetent, irrelevant and immaterial, not the best evidence, not binding in any way upon the defendants, or tending to show where the shore line is, or was at any time.

The COURT: Objection overruled.

(Said Exhibit C is found on page 4 of said Book of Maps.)

110 Mr. ANDERSON: We now offer as Exhibit D, Map 10 of the United States Coast and Geodetic Survey of 1859.

Mr. MCKINLEY: We make the same objection to that.

The COURT: Objection overruled.

(Said Exhibit D is found on page 5 of said Book of Maps.)

Mr. ANDERSON: We next offer as plaintiffs' Exhibit E, United States Coast and Geodetic Survey map marked 610, issued in 1886.

Mr. MCKINLEY: To which we make the same objection. I will

add to that the further objection that it seems to have been made at a time subsequent to the date when the application for purchase was made, or at the time when we, or our predecessors in interest, acquired rights in the property; and no subsequent act or survey can in any way affect the rights of the defendants' predecessors.

Mr. ANDERSON: I will state these maps show on their face, I think, that they are based on prior surveys and soundings. These maps generally have a legend upon them, showing just what they are based upon.

Mr. McKINLEY: I submit that this is entirely secondary evidence, somebody made those soundings, reported it to somebody else, and so on, and then somebody finally puts them on the map, and then that maybe is revamped in a succession of maps, 111 and we can hardly tell how far we are from the best evidence. I would like to add further to the objection, by objecting specifically to the portions of the map, such as the figures, showing, or purporting to show, soundings on the ground, that it is not possible to show those matters by figures on the map.

The COURT: Objection overruled.

(Said Exhibit E is found on page 6 of said Book of Maps.)

Mr. ANDERSON: We now offer as Exhibit F in this case, copy of original topographical sheet, 706-B, entitled "Improvements in the town of Wilmington and Wilmington brakewater as surveyed in 1873 by the United States Coast and Geodetic Survey.

Mr. GIBSON: We object to it on the same grounds stated in the objections to Exhibit E.

The COURT: Objection overruled.

(Said Exhibit F is found on page 12 of said Book of Maps.)

Each of said Exhibits C, D, E and F was duly certified to be a true and correct copy of the original thereof in the office of the Department at Washington by the legal custodian thereof.

Mr. ANDERSON: We offer as Exhibit G in this case, certified copy from the War Department of map of San Pedro Harbor, showing the proposed harbor lines approved by the Secretary of War, 112 July 29, 1908; also pamphlet accompanying the same, explanatory of map.

Mr. GIBSON: We object to the introduction of the map and pamphlet for any purpose other than the fixing or showing of the location of the harbor lines as fixed by the Harbor Board.

The COURT: The map may be received for the purpose of showing where the harbor lines are.

(Said Exhibit G is found on page 13 of said Book of Maps.)

F. C. TURNER, called as a witness on behalf of the plaintiff, being duly sworn, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I live in Oakland, California. I am City Engineer there. I was Assistant Civil Engineer in the United States Engineer's office from about 1890 until the fall of 1897, excepting about a year in

1892. I resumed again after the Spanish War up to the beginning of the year 1900. I had employment with the government in the fall of 1887 and when that work was ended, from 1888 as near as I can remember till about 1897. The engineering work I did while in their employ was surveying, inspecting, drafting. My work was on river and harbor work—almost entirely—some battery work. I graduated in 1887 and the first employment was with the United States Government in the hydrographic coast survey work in San Francisco harbor. I was in charge of the last jetty work that was done in San Pedro harbor in 1897. In that connection I made surveys of the outer harbor and bar. It was a hydrographic survey, based upon triangulation, and some shore work with the transit; mostly it was the location of soundings by sections. I prepared a map or plat. I was acting during the times under instructions from Capt. Meyler, who was then in charge of the United States Engineering office in Los Angeles and in charge of the work at San Pedro and Wilmington. The map now shown me (found on page 14 of book of maps herewith) is a blue print of the tracing that I made of the harbor survey. Some of the drafting work I did not do, but the projection of the soundings and the filling in of the shore line and that work, that is my personal work. I have read the legend accompanying this map and it correctly sets forth and describes the various markings upon the map. In doing this work the sounding in shallow water was done with a sounding pole and from a boat, and the soundings after being recorded were reduced from tide readings, on the gauge that was read during the sounding, the time being noted in the tide readings and also in the notes of soundings.

Mr. GIBSON: We object to this evidence on the ground that all this work thus far testified to by the witness appears to have been subsequent to the issuance of the patent here, and is therefore incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

The soundings were run along certain ranges which were shown by signals, and the boats located at intervals, and the soundings interpolated between the locations of the boat; and after the work was done, of course they were platted on the sheet as shown here. I was in charge of the party that did the work and assisted in doing the work myself. The method employed by us was the approved and correct method used by engineers for that purpose. The figures upon that map indicate the correct depth of the bay at those points respectively. The minus sign indicates that those are the elevations above the plane of low water. The figures without any sign before them represent the depth below the plane of low water. The line of low tide upon that map is indicated by the dotted line. The solid line indicates the line of high tide. The point from which we made those soundings as I remember it was north of the Red Beacon as indicated on the legend. The Red Beacon is shown marked opposite Timm's Island. The line marked "Southern Pacific Railroad" is the line of the S. P. R. R. in Wilmington and San Pedro.

115

Cross-examination.

By Mr. GIBSON:

I have not seen this map since I made it some ten years ago prior to seeing it here today. As to the dotted lines; the dash and the dot means one fathom curve; and two dots a two fathom curve. The conventional lines, composed of small dots represent the low tide line.

Q. Was that merely a conventional line or does that indicate the exact line upon the ground?

That is the line as I located it from the soundings; that is the only way it was located. Every point on that line indicates the zero depth, and located by locating the depths by soundings. It simply represents what I supposed to be the low tide line as indicated by those soundings. At the points where I touched upon it it represents the real lines upon the ground and between the points selected of course it is sketched. I would like to explain that these soundings are not all the soundings that we took. There are other soundings in between, and when this line shows a deviation it is not a mere arbitrary guess—it is due to the additional soundings. I have not got those soundings with me and could not recall them now. We made those soundings with the pole. We paid some attention to the characteristics of the soil we came in contact with as indicated in those red borings. That was done in order to ascertain whether

there was any rock or other hard material below the surface of the soil covered by the water. The rod with which we made the soundings is weighted so that it is practically the same weight as water when it is submerged to about its average depth and you can readily tell whether you strike bottom or not. We found some soft bottom and that the pole did not go into the materials below the surface mud. The character of the material under water throughout that area would vary—in the channels it is hard and sandy. When you get on the outside tracts there are some parts that are not so hard. My recollection of the soil up here under the hatch lines, is that it was softer than the main body of the bay, but of course it is the part of the work of the surveyor to see that he gets an accurate depth of water, and to see that his lead is not pushed too far down into the soft part. We had a sounding pole with a broad bottom, about two inches square as I remember it. I do not recollect clearly enough to distinguish between the character of the bottom lying west of Terminal railroad right of way and the other. It was somewhat harder as I remember it. I did not observe any erosions there at all made while we were at work. We made these soundings at all stages of the tides. When we were on the shallow flat of course we had to restrict our work to the higher tides, but we worked as nearly as we could continuously, usually at high water, because we could not get into the shallow areas except

at high tide. We found some fine, soft muddy sand. I could not say that it was mostly of that character. I could not tell you how much. I do not know. The report of the borings would show the character of that land. Those borings were made at all stages of the tide. For a boring machine we used an auger, as I

remember. I have forgotten whether we used a well boring apparatus or not—I think we did. I am not clear as to the size. There were engaged with me in that work, one man reading the tide gauge; two boatmen and the rod man, leadsman, recorder and myself. The straight, heavy white lines represent the high tide lines. I located those by direct observations along the shore. We would take observations where the changes of direction were. If there was a straight stretch we would take them at greater intervals than where they were irregular. We took enough observations to follow the irregularities of the shore. The dotted red line shows the line of the proposed channel to be dredged, the turning basin at the upper section. It continues clear on through.

Cross-examination.

By Mr. BORDEN:

Where the wharves were constructed along the east side of the basin out into the water or up to the so-called harbor line, in order to determine the depth we would row underneath the wharf and sound clear under the wharf. There was no bulkhead up to 118 the wharf up to the line of solid bulkhead, but most of those wharves were just pile wharves at that time. Along the wharf if the depth was beyond the length of the pole we used the lead line. If the bulkhead was beyond the low tide line, of course, the bulkhead would be the line of low tide, but in most of those wharves as I remember it, take the Salt Lake Railroad particularly, you could row right under the wharf and then strike a shelving beach, which extended from low tide up some distance and there was a bulkhead back of that. There were some bulkheads there that I do not recall, where the low tide line was not bare beyond the bulkhead. There we put the bulkhead in as the low tide line, if there was any such case. I do not remember clearly about that. We were only able to tell, of course, where that line was by being able to get on shore far enough to measure it—if there was anything to prevent you getting on shore, you had to take the water at the depth you found it.

Cross-examination.

By Mr. KARR:

The ordinary high tide line from that territory south of what was the south end of the railroad wharf, Southern Pacific Railroad Wharf, in 1899, south to the training wall, was taken from a coast chart. The shore line south of Smith's Island and south of the Red Beacon was made by the coast survey. We did not make any soundings at all. South of Smith's Island, I took soundings, 119 but the shore line was located independent of that. I did not go back beyond the low tide line. From the end of the railroad wharf down to the Red Beacon I sounded, between 1500 and 2000 feet. I did not sound to the high tide line. I sounded to the point where the boats could reach at that stage of the tide. I did not consider it important beyond that for any purpose. I do not

know at what stage of the tide we were working at down there. I could not by reference to my notes locate the high tide line as it existed at that time; that is, between the Red Beacon and the southern end of the Southern Pacific Railroad Wharf. The map does not show the soundings, it simply shows the characteristics of the soundings.

Cross-examination.

By Mr. MILLIKIN:

This irregular line along the wharf from Smith's Island south on the west side is the ordinary high tide line in that vicinity delineated on that map. I made soundings in the slough between Smith's Island and the mainland. I do not remember at what stage of the tide. The soundings indicate that at low tide the slough does not have any water in it. The minus sign indicates above low tide. The plus sign indicates below low tide. If there is no sign given it means plus or below low tide, that is, the mean of low lower water established by the U. S. Coast and Geodetic Survey. The bed 120 of that slough was muddy. The ruled lines are, of course, artificial construction. Zero is used by the coast survey which is the mean of the lower low water.

Cross-examination.

By Mr. KARR:

The difference between the plane of low water and of ordinary high water is something over five feet. 5.2 something of that kind, I do not remember. It cannot be ascertained from the map. I think I can ascertain the mean low tide line from the map. The mean high tide line was run not by soundings but by surveys from the shore, and is supposed to indicate the line to which the mean tide reached. The mean high tide is an average. The tide is variable and it does not exactly reach the same point from day to day. In the course of time tides will reach the same height. The mean high tide is an average of all the high tides. It means an average. There may be some tide which would be just an average but it is an unusual thing. It is a difficult matter to accurately determine the high tide line on the shore; but you can define a line which is comparatively close to it; that is, the approximation is close, but it is an approximation after all more or less. I do not pretend to lay it down with the exactness that you would in surveying a city lot. The mean lower low tide is made up of an average of all of the tides, and the same uncertainty and same extent of variation would 121 prevail. Of course, in making these soundings we did make actual measurements of depths, and we transferred that and adapted it to something else. We took as a datum plane, the zero plane as used by the coast survey. There is a bench mark there in the harbor; I don't remember exactly where it was, but we got a bench marking the elevation of a definite point. Then we transferred that elevation from the bench mark to the tide gauge; then we observed our tide gauge at different stages of tide while the

soundings were being made and we had to equalize these soundings to correspond with the tides. I am not clear as to the tenths, but I believe it is five feet or perhaps 5.2 feet above the plane of mean low tide or lower low tide to ordinary high tide; somewhere within a few tenths.

Q. How did you determine that to be the mean high tide line?

A. Well, we know what the average was from the coast survey chart, in the first place, but there is a well defined line in most places on the harbor, as shown by the markings of the shore itself, by drift and in some cases by the character of the vegetation.

I know by my observation of tidal waters that the shore changes by erosion and accretion, and also by the action of the tides in varying amounts, some places quite stable, some places not. It is true also of a flat bay or body of water or land, mud flats, such as you find in the inner harbor at San Pedro, that the shore changes by erosion and accretion, and by the action of the tides. It differs at different places and may vary at different times of the year. I know that when there is extreme rainfall there have been times when the Los Angeles river, or some branch of it, came in there, but my impression is that that survey showed some filling from previous times. I would not like to testify as to the amount because I do not remember it. There are changes going on all the time with more or less frequency with regard to the depth of the water in a bay such as the inner bay of San Pedro. I think in San Pedro Bay it is small. I think I completed these soundings in November and commenced in October. I have never had any other occasion to observe the change, if any, in that bay. I do not know anything about the actual changes upon the ground before or after I made the survey. I do not know how the San Pedro or Wilmington tide flats compare with the Oakland tide flats. I have observed the Oakland tide flats.

Redirect examination.

By Mr. ANDERSON:

A bench mark is a monument or definite point whose elevation is known. That bench mark was established by authority of the United States Coast and Geodetic Survey. I stated that I had not seen this map for ten years. I went over my notes this morning, the original topographical sheets.

Mr. ANDERSON: Your Honor, we wish to offer this map in connection with Mr. Turner's testimony, as Plaintiff's Exhibit H and will state again that we expect to show that substantially throughout the body of the bay there have been practically no changes except possibly filling in of channels or where changes have been made by man.

Mr. GIBSON: We object to the reception of the map in evidence on the ground that the soundings delineated on the map were made long after the patent in this cause was issued, and that the high tide line adopted by the witness in making his soundings and in

making the map is not the correct high tide line; and that it is incompetent, irrelevant and immaterial.

The COURT: The objection will be overruled.

(Said map was thereu-on introduced in evidence being plaintiff's exhibit H in case No. 64535 and is found on page 14 of said book of maps filed herewith.)

G. M. LOPEZ, a witness produced on behalf of the plaintiff, and being duly sworn, testified substantially as follows:

124 Direct examination.

By Mr. ANDERSON:

The WITNESS: I live in Wilmington and have lived there since 1872, off and on. My business is a laborer. I have had occasion to observe the inner harbor of San Pedro or Wilmington Bay, during that time, in some ways. At the time of my going into Wilmington, I used to go over on the shores of the bay and gather wood, and tow it up the bay in a skiff or small boat. Since then I have often been on the bay, more or less. I have helped to draw seines for fishing, myself, several times in the bay of the west basin. I have seen the others fish there. There was some fishing done in the east basin too. The time I am speaking of is off and on during the time that I was in Wilmington—I don't remember the date—between 1872 and the present time. Over in what is called the west basin, west of where the railroad company's track is now, I have seen scows and lighters—I don't know whether you would term them boats or not—some small scows. I remember the location of the wharves in the early days when I first went to Wilmington. There was a wharf located on and about Canal street, joining the line of Canal street in one portion. Some of the old piles are there yet, toward the shore—some of the stumps. There was a little concern they used to call a shipyard there—if I am not mistaken it is off what

125 we call F street nowadays; that is, on the west side of the Pacific Electric track going across to San Pedro. I couldn't tell whose plant that was. I remember seeing lighters there, to be cleaned, the bottoms of them—small scows I guess they called them. As to any changes in the bed of the Wilmington Bay above low tide—I am not much of an observer of that sort—I think the bay looks to me very much now as it was then, outside of the fillings by dredgings, and some times floods might fill in. Outside of that I don't notice much difference. Take the west basin—that is, that portion of the bed lying west of the Southern Pacific Railroad and north of Smith's Island—I observed there has been some piles driven inside of the west basin, and some attempt was made here a while back to build a bulkhead there as I understand it, but I don't know as any other changes have been made there; that is, west of the railroad track. East of the railroad track I don't know as any other changes have been made outside of what has been made by developing the harbor by dredging. I live in sight of the bay on the corner of J and Fourth streets. I lived there a little over a

year—before that I lived on First street, corner of Willows, for five years, that is, about two or three blocks from the bay. I lived on Second street from 1892 until the last six years or so. When I first went into Wilmington we lived on Canal street, between Fourth and Third.

126 Cross-examination.

By Mr. GIBSON:

I don't remember the number of scows I saw in the west basin. They were not so big as some of them in existence now. I didn't see those scows up the channel, but on the shore—when they were brought up on shore. They brought them through a small channel that used to be open at that time, between the main channel and several outlets that used to be open then; it went on towards the west basin. That channel has been filled up partly by the dredgers. I couldn't tell you that it has been filled up by the action of the tides. I was not particularly interested in the changes—to observe them. Those scows were flat bottom boats. They must have had a very light draft. They wouldn't have to be very narrow. The channel was wide enough, but not deep enough. I don't remember whether they got stuck in the mud or not. It is a good many years since I saw the last barge or scow in there—I don't remember the time. Those scows were on dry land—I don't know when they got them out; whether it was high or low water. Lots of times I saw men poking them in the mud, and draw them along over the water after they got them out of the channel, getting them along toward the shore. I have observed that bay for a number of years,

and have not noticed any particular changes in the bay outside of what has been made in the development by mechanical means. I don't think there has been any changes made by the tides. I was not sufficiently interested, and have not noticed whether any has been made or not. I have seen lots of fresh water running into that bay. Have seen one flood or two. Those floods went back into the willows on the Cerritos Ranch, or somewhere around there. That is a considerable extent of country. I don't know how long that little boat building continued near the foot of F street. It was not there very long to my knowledge.

Q. As a matter of fact you hadn't seen any boats, lighter vessels, or other vessels in that harbor for a number of years,—the west basin?

A. I have seen a trader in there very recently, and there is a scow there now. The last I can recollect helping to draw a seine was about 8 or 10 years ago. In the east basin we fished in the main channel—the one that the boats went through to the foot of Canal street. That is east of the railroad track. In the west basin there is considerable mud flats there at low tide. But there is considerable water also at low tide. I have never measured the low tide line. I didn't notice any difference in the appearance of the mud flats in years. I didn't take any notice there. All I say there was water there at times and I saw mud flats there at times. I never

128 saw the west basin without any water at any one time during my recollection. I don't know whether I would be surprised or not to see a photograph showing there was scarcely any water there at low tide. There has been water in some of the channels, most of the channels. There is some of the channels that always has water, where there may be some of the land that may go dry in the west basin. The east basin is covered more by flats, as a general rule, than the west basin, and more land is exposed at low tide than in the west basin. Outside of the improvements that have been done, the bay looks about the same to me now as it did when I first saw it.

Cross-examination.

By Mr. CHAPMAN:

I remember the warehouse that stands on the corner of Front street and the street now called Fries street (C street). That was the old government warehouse. The land immediately south of the old warehouse was covered by water at medium tide, or high tides. At dead tide the water did not go there. There was some of the land that was covered by high water there. I remember the little channel that runs up to the east of the warehouse as shown on the map. The tide waters ran in that channel as far as the railroad track. The land up to the railroad track in some places was low, and in some places it was a little higher, and I have went over them and there was places where the water did go on the west side of the warehouse quite a distance up towards the town. That land 129 looked to me the same just before the dredging was done, that it did when I first saw it. I remember at one time there was a piece of old wharf that extended out to the water. It was not in use in my time—I don't remember it in use. I seen the piling and stumps in the water. The stumps of the piling, after you got out of the channel a little, you couldn't see them. The channel was 5 or 6 feet wide. There were three channels that carried the water as far back as the railroad track. The channel that I have reference to, cut off a little west of C street. There was considerable acreage between the old warehouse and the channel. It was covered by water at high tide. I don't know whether the entire tract was covered or not, because some of that is a little high adjoining the warehouse. I don't think there is five acres—there might be though—I am not positive about the amount of land. I have done some boating in the west basin. I have a skiff tied up at the foot of J street. I had it in use not later than last Sunday. I went out in the boat and had a ride in it. There was no extreme high tide. There is more than one channel in the west basin. At medium low tide you could not run a boat up there—not to the shoulders. I could go to the center in a great many instances, with a small skiff, but I would have to confine myself to the channels that extended into that part of the bay.

130 By Mr. GIBSON:

I don't remember anything about General Banning having

dredged the main channel of the east basin, from the foot of Canal street south. I never saw any dredge there, prior to the present time.

Redirect examination.

By Mr. ANDERSON:

The tide waters went up as far as the railroad track on the west of the little channel leading up to the warehouse. That railroad track was a switch or spur that runs over into the warehouse. It goes in underneath the rails in places, and in places it don't. I guess the track is there today. There have not been any large scows or boats in the west basin since the railroad was put in outside of the dredger. That dredger was taken in overland. I don't think scows such as I originally saw at the little ship cleaning plant in the west basin, could pass under the railroad track. The piling of the trestle work is built in such a way that it don't allow the very small skiffs to go through there at high tide. It has got to be down at some low tides, in order to go under the trestle. I don't know whether the little ship yard disappeared before the railroad was built across the lagoon or not. I was not there when the railroad was built.

131 DR. J. P. WIDNEY, being first duly sworn, as a witness called on behalf of plaintiff, testified substantially as follows:

I am a resident of Los Angeles. Have been a resident of the state about 40 years. During my residence I have been familiar with the Wilmington and San Pedro harbor, and have observed conditions down there. It became my duty as head of the Harbor Board before the Chamber of Commerce was organized. I landed at Wilmington in January, 1867. The Wilmington wharf was being used for traffic and commerce at that time. That is the original wharf that was afterwards extended farther down the channel. The original wharf was located at the foot of Canal street. I have noticed the line of the old pile work, extended down parallel with the channel. I don't know just how far they went down, several hundred feet as I remember it. That is represented by the old piles that are standing at the foot of Canal street now. When I first went there, the channel went right to the wharf, and it extended down three or four hundred feet toward the west along the channel—extending the area of the wharf. I spent about a month at Wilmington with the troops, in 1867. I was then a surgeon in the army. I think that the old warehouse which stands south of Canal street—the quartermaster's department—was built then. I am not sure about the name of the street. I have a vague recollection of a ship

132 repairing or lightering repair establishment that now stands at the foot of F street; and I have a vague remembrance of seeing that in use. The remains are standing there now. I have examined them during the last month—quite a large establishment. When I went there in 1867, the town of Wilmington was larger in population than it is now. I should judge it was a busy place then. The government kept at that point about 1,500 troops—at the barracks. They supplied all the posts for years, and all these

supplies for the department come through that point. When I speak of the population of Wilmington exceeding that of the present time, I do not include the troops. There was a large number of people employed there outside of the troops, and probably six or eight stores. I was familiar in those early days, with the appearance and condition of the bay at low tide. From time to time I have observed it since then, and recently. As to the general physical condition of the bay north of Boschke's Island, in those early days, compared with the present, the shore line seemed to remain about the same. I could notice but little change, more than what would come with a little washing in there of the winter storms, so slight as to be unappreciable almost, but the channels were gradually shoaling through that west basin. I am less familiar with the east basin. In the early days I think there was more water
 133 in the west basin at low tide than there is today. I think there was more water in the west basin at low tide in 1880 than there was ten years ago, because the shoaling has been gradual year by year; the soil above Wilmington is light and washes readily with storms and surface water. I am familiar with the conditions there now. I think there is less water there now than in the early days. At low tide in the west basin now, the water seems to be in the channels that are left, but many of the channels seem to have disappeared.

In 1874 Major Jones built a wharf, starting somewhere near where that old government building was,—somewhere between there and the foot of Canal street, running out toward San Pedro, several hundred feet, until it struck the main channel below. There was a fierce war between Major Jones and Banning at the time. I was down there at the time. I think the extremity of that wharf passed outside of where the railroad track is now, that crosses the bay. I am not quite familiar with the railroad track as it lies there now. As to there being any fishing in the bay, I can only say that I have a general recollection of boats over those basins—all over there—the west basin with the other.

Cross-examination.

By Mr. GIBSON:

I am in my sixty-eighth year. I live now at Los Angeles,
 134 not at Wilmington. I never heard the wharf I have spoken of as built by Major Jones, referred to as Wilson's wharf.

Q. They had to build a long wharf to get out to navigable water, water that would keep the boats?

A. No. Major Jones told me his idea was to parallelize the side channel, and use that side channel for lumber vessels. I couldn't tell you how much of a channel there was there. That is one of the channels I spoke of as shoaling up. It is now under dredge so that you can't tell much about it. It had shoaled up before this dredging commenced. Major Jones put in the pile work next to earth work, and that mud began to silt over it, and began to fill the channel, and work was abandoned. I don't know how long the wharf was used. I never saw any boats at it. I was there at the time. The floods of

the Los Angeles river, the engineers have told me, had shoaled in the channels east of Wilmington, but the west basin would hardly be reached by those floods. In the west basin, I think, there has been a gradual shoaling from the washing of the land. I never examined it. I don't recollect anything about the dredging in any of these channels, from early days. I don't know that the wharf that was built by Major Jones, was built along side of the main channel. It struck the main channel at its extreme end—it paralleled a side channel. When I say the main channel, I should qualify
135 that. There was at the mouth of this side channel, a widening out before it struck the main channel. There was room for three schooners in this side channel, before striking the main channel,—the Lambard schooners that ran from northern ports. I never heard of any dredging having been done there. I was the Harbor Committee of Los Angeles myself. I prepared all the documents that went to Congress, and then when the Chamber of Commerce was organized I turned the work over to them. I was a self appointed committee in the interest of the public, and called the citizens together each year to sign all documents. It would date back beginning a year or two after I came here, or I might say, from the time we secured the appropriation for the inner harbor, from the early 70's, until the Chamber of Commerce was organized, and I don't know what year that was. I was in the work of the Chamber of Commerce afterwards, and on the Harbor Committee.

Redirect examination.

By Mr. ANDERSON:

I examined the ship building plant over on the west basin about a month ago. There is an excavation about 30 feet wide, starting from the water's edge and running back about 30 feet, and probably 70 feet long, until it struck the level of the land above, and beyond that I couldn't tell. At the lower edge of it, one of the timbers, a foot
square, running across with heavy iron bolts running through
136 it, showing a very heavy plant, is still standing there. And the ways would be like any one of the old large lighters employed in the early days, bringing in vessels. I didn't see any of the ways in use, or operation, but of course I was only there occasionally, and I couldn't tell. I have a vague impression, but I couldn't swear to it. I think I can locate the ship building plant on Exhibit F. It is in this little curve which I mark with an "S." That is at the foot of F street.

Cross-examination.

By Mr. GIBSON:

Q. Do you remember the canal that was dug by one McFadden up near the old quartermaster's building or warehouse?

A. Do you mean the canal that lies right at the side of Canal street, the channel ran by the side of Canal street—that is the only canal I know of.

Q. By C street, at the foot of C street?

A. I don't remember.

Mr. ANDERSON: As Plaintiff's Exhibit I we offer United States Coast Survey, Section 10, of the coast east of San Pedro Bay, Cal., surveyed in January and February, 1872. It is part of some of the maps we have already offered, showing the easterly part of Wilmington Bay. It simply continues the coast line on down as far as Long Beach. We offer it to show the eastern part of Wilmington Bay, and the channels leading from that to San Gabriel river.

Mr. GIBSON: Objected to on the same ground stated in the objection to Exhibit E.

The COURT: Objection overruled.

Document last referred to was introduced as Plaintiff's Exhibit I (said Exhibit I is found on page 17 of the book of maps filed herewith).

Mr. ANDERSON: We offer the map attached to and forming a part of the patent to the San Pedro Rancho, contained in book of patents 1, page 120. The purpose of it is to show the exclusion of the navigable waters of Wilmington Bay from that patent, and the survey around the exclusion made by the United States Surveyor. We also offer the attached sheet containing the field notes.

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

The document last referred to is Plaintiff's Exhibit J. (Said Exhibit J is to be found on page 18 of the book of maps filed herewith and made a part of this statement.)

It was stipulated that the said patent to the said San Pedro Rancho dated Dec. 18, 1858, should be considered as admitted in evidence as a part of said Exhibit J, subject to the same objection and ruling and that either party might read or refer to such portions of said patent as might be material.

138 SAMUEL A. WIDNEY, a witness called in behalf of the plaintiff, having been duly sworn testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I have lived in Los Angeles county since 1874 with some few visits or trips outside. During that time I have been familiar with the bay and town of Wilmington. I first became familiar with the bay of Wilmington in 1874, when I made a special trip there. I have been going to and coming from the bay off and on ever since. I am interested with my brother in property at Wilmington and reside there as my legal residence. It has been my legal residence for three or four months, but I have lived there for a year and a half to a certain extent before I transferred my vote. I have been interested in property with my brother, the property stands in my brother's

name—for some time. I have been boat riding on the bay a number of times. Along about 1895 was the first time, but I have been on the ground since 1874. I have seen fishing boats on the bay since 1874.

The Jones wharf that ran off to the west of the Canal street wharf, headed off in the direction of the west basin and the old ship building plant was off in the same direction. The old ship building plant was located at the foot of F street I think, in the town of Wilmington, the foot of the street that leads from Green's house
139 down. We examined it about a month ago, just looking for it. I remember at the time I was there in 1874, work was being done over in that neighborhood, and that was why I went to look up the location.

Cross-examination.

By Mr. GIBSON:

I presume that was largely a repair yard. I did not examine it critically in 1874, simply saw it from a distance. I don't know what kind of boats were repaired there. I never saw a large ship out on the ways. I could not say that I ever saw any scows on the way—I saw work being done there, evidently ship work. They were working on lighters—I presume flat bottomed boats—I didn't go to examine them. My understanding of it was that it was more of a repair yard than a ship yard. I do not remember when I last saw that yard when it was in operation. My visit in 1874 was a trip that I went there especially for information, and I took more pains at that trip than any subsequent trip. I have no recollection of seeing the ship building yard since 1874 that I can positively swear to. As to boats that I saw, I suppose they were fishing boats; I could not say positively whether they were or not. I would see them from a trestle or from the shore, just from looking over the water, as I would naturally look over it, till about 1890, when I did some
140 boating in a row boat. I have seen boats in the west basin at all stages of the tide. I have seen the bay at low tide but never uncovered. I have been there at all tides during the last year and a half.

Q. Could a boat sail over that inner bay, a small row boat, at the low tide—ordinary low tide?

A. I don't know what the depth of the water in the channel might be coming in and out, but there is plenty of water I should say to float a boat at any time; even at extreme low tide over the greater portion of the inner bay. In driving around the bay, as I have frequently driven from Wilmington to San Pedro, I have driven at all stages of the tide, and there was water in the basin.

Q. Do you mean that the boats could go all over it or only in the channel?

A. I have not boated myself, so I could not express a competent opinion as to boating in that channel. I simply am giving my judgment from hearing it. The fact is I did no boating in the west basin. The boating I did was over nearer San Pedro. I can only tell you what my eyes saw, nearer the main channel from

Smith's Island and in the slough back of Smith's Island and over towards San Pedro proper. I know the difference practically between ordinary low tide and lower low tide. At ordinary low tide the west basin has a large amount of water in it. My opinion
 141 from my eyes is that that water would cover the greater portion of the land in the west basin at ordinary low tide. I saw the water cover the low lands—up towards Wilmington. I would say that fully three-fourths of the surface of the inner basin was covered by water at all stages of ordinary low tide. I don't know that I have ever seen the tide the lowest that it ever gets, but I have seen it lower than at ordinary low tide. I have seen that covered less than perhaps one-half of the space in the west basin—probably one-half of the land. There is a large basin there that has a great depth of water in it. Without having examined it critically as far as I am able to judge there are channels that allow the water to drain out of the west basin as far as it naturally would by the action of the tide; that is drain out into the main channel, it would not go into the west basin. With the outflow of the tide it would go towards San Pedro down by Smith's Island. There was no obstruction to keep the water there that I know of except such as came from railroad filling and other fillings to keep it from going out the same channel.

I have seen boats similar to those that I speak of down by San Pedro. Most of the boats that I saw were at San Pedro. I never made a tide land application of any kind in Wilmington. I never heard that my brother did. I never heard of it; and never had any interest in any such anywhere that I know of.

142 DR. J. P. WIDNEY, recalled and examined by the court:

I have examined the panoramic photograph Exhibit L. I judge it represents the Wilmington Harbor from somewhere about Canal st. in Wilmington. Comparing that photograph with the appearance of the bay thirty or forty years ago, when I first knew it, I would say there was more land along here now in front of the town of Wilmington in the shape of islands than there was then to my recollection; more filling in. Other changes, of course, are the railroad tracks, the Pacific Electric and the Southern Pacific, other than that I think the shore line has encroached upon the water somewhat along the whole course of it, opposite the town of Wilmington. The building at the extreme right is so out of proportion that I fail to recognize it as the government warehouse. There is an encroachment of the lands upon the water, and more land is visible out in the basin itself, in the shape of islands. I do not know that I notice any other changes. Of course these wharves are gone that were there—the railroad wharf below—the old Jones wharf is gone. I cannot locate the wharf built by Major Jones from this photograph. This of course is exaggerated in the perspective, so that it confuses me. The wharf or channel constructed by Mr. Banning to which I testified the other day is the wharf here at the foot of Canal street, paralleling the channel. I observe the artificial channel constructed along Canal street. I don't remember when it was not there. I could not say positively
 143

whether it was there when I first saw the town but I do not remember it not being there. On this map the marine ways which I spoke of would be right in here at the foot of F street, on this little bight in here. This is the front of F street and that is the curve there that would correspond to what there was then. When I first knew that locality the main travel by boat came by the channel from San Pedro. It was a crooked channel and came here to the foot of Canal street. That was the landing place. But there was boating more or less off through the west basin. I could not specify—only the general fact.

S. A. WIDNEY, recalled on behalf of the plaintiff, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I met Mr. Phineas Banning in the early seventies, in the spring of 1874, and had a conversation with him on the old wharf at Canal st. It related to the wharf and the harbor interests and Mr. Banning's quarrel with Jones. There was no one along at the time because my brother, Dr. Widney, was off seeing a patient. I was for several hours with Mr. Banning on that wharf. There
144 might have been others and there might not—they were going and coming. It was a visit of several hours on the wharf.

Q. Just state what that conversation was.

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

Mr. Banning made the statement that the waters of the west basin were much deeper and more available for commercial purposes than I supposed they would be; that the west basin, with very little work, would be suitable for vessels of much larger draught than they were drawing into the old quarters. He objected to Mr. Jones—His objection to the Jones franchise and operation was that it came between him and the deeper waters of the west basin; and if Jones came between him and the west basin that it curtailed his, Banning's chances, because the flood of, I think 1862, he referred to, had been shoaling the old quarters, and he felt that he would later have to move towards the west basin and deeper waters. That was about the extent of the conversation, excepting a request that he made of me before I returned to Los Angeles on the train. He suggested to me, "Mr. Widney, you are a newspaper man"—I was then city editor with the Herald—"and I wish you would not publish the information I have given you, as it might hurt my chances in obtaining what I want."

145 Cross-examination.

By Mr. GIBSON:

Q. Are you sure, Mr. Widney, that General Banning referred to the west basin?

— He pointed it out as we stood on the old wharf. I don't know that he called it the west basin, and showed me the spot. He was pointing over towards what we now call the west basin. My impression is that he used the term. I could not be sure. We were standing on the old Banning wharf—a portion of it is there now. It has been added to and extended. It is in the same location.

Q. Don't you know that the term "west basin" has been coined comparatively recently, since the railroad, the Southern Pacific Railroad, built this trestle across?

— It is used now more than formerly, but he spoke of the geographical direction. I could not say that I ever heard it called the west basin prior to the construction of the railroad. He pointed out the land from the wharf. I do not know whether he gave it a name. He pointed over to a location beyond the Jones wharf; generally over the whole point of land now called the west basin. He did not point out any spot, he was speaking of the deeper waters over there. He spoke of the channels into that deep basin, which he said would be easy of improvement. He spoke of the water being available for commercial purposes, that it would be much more available

146 than that he then had. He thought it possible that he would have to move there some day with the shoaling of the eastern portion of the harbor. General Banning was then engaged in commercial business. By commercial purposes I mean vessels going and coming. He was engaged in shipping. It was in that particular that we were speaking about, shipping, marine affairs. General Banning did not tell me he owned that land at that time in the harbor; because in his second request he referred to that fact, that making the matter newspaper matter would injure his chances in obtaining what he wanted. He said he wanted it for shipping purposes if he had to vacate where he then was. He spoke with reference to navigation. I say that because he spoke of the ease with which it could be made available for larger vessels than came to Canal street. I know they can dredge any where around there and make a new channel. I don't remember whether I published anything on the subject when I got back to Los Angeles.

I attended a public meeting recently in Wilmington. I did not abuse the Bannings. I discussed the matter as a matter of public interest and expediency and I spoke with extreme plainness. I have no feeling one way or the other concerning the present successors in interest of Phineas Banning. There are public interests at stake

147 wherein I feel called upon to speak which I did. I could not quote exactly what I said. I do not think I have ever spoken to one of the Bannings personally. I did not go out of my way to charge them with irregular action. I have an interest in the particular matter now, a harbor interest and have a positive

definite view on the subject. That view is not favorable to the Bannings' claims.

Mr GIBSON: Defendants move to strike out all the testimony relative to that conversation with Phineas Banning, detailed by the witness, on the ground it is incompetent, irrelevant and immaterial.

The COURT: The motion will be denied.

E. W. MERWIN, a witness called on behalf of the plaintiff, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I am a clerk in the City Engineer's office in Los Angeles. I prepared the diagram which is Exhibit A in this case. (Said exhibit A found on page 1, book of maps filed herewith and made a part of this statement.)

Mr. ANDERSON: I will state that we will offer this simply as a diagram, not for the purpose of locating positive lines.

Mr. ANDERSON: Now, Mr. Merwin, this purports to show the inner bay of San Pedro, and the channel leading out to the outer harbor?

A. Yes sir.

148 Q. Now, will you tell the court just what is indicated on that map? Take the exterior limits there—from what were those derived?

A. The exterior limits of the inner bay are located from the tide land grants. It is shown in yellow, vermillion, blue and green, also brown. Every colored line indicates the limits of a tide land patent and that is true also down in the west channel. The double lines which intersect the inner bay indicate the harbor lines as approved by the Secretary of War. The line shown by the double dot and dash and the dotted lines and the double line are the lines established by the Secretary of War and furnished us by the United States Engineering Department in this city. They begin at a point near Dead Man's Island, following the easterly line up to the so-called turning basin, and then split up into two basins. The west is known as the west basin and the east as the east basin. The west side of the channel is indicated as running starting down at this point, station 219, following up here on the outer harbor; and on the inner harbor turning at engineer's station 16 and thence to Smith's Island. Smith's Island is shown and the channel between it and the main land is shown. The Pier head Line and the Bulkhead Line from station 25 to 54 and from station 29 to 484. These are the harbor lines established by the government. The lines

149 across the bay running from Wilmington to San Pedro indicate the Southern Pacific Railroad and the Pacific Electric Railway or Los Angeles Interurban Railway. The primary data used in preparing this diagram was furnished by the United States Government, showing the location of the harbor lines, and a number of

natural objects to which they have tied in from one point. The tide land patent lines are tied in where possible to natural objects, and where not possible have been tied in by our own private surveys made under my direction. Where good ties have been found, I have merely followed the record in drawing those lines on there. I don't know whether they are correct on the ground or not. Government patents have been furnished us direct from the land office in this city. The patent to Lot 2 of Smith's Island is furnished by the state from Sacramento and the remaining tide lands are copies of the patent description. The street lines are copies of maps in our office and are put on for diagram purposes only. I believe them to be absolutely correct, but they are put on for diagram purposes only, in order to show the court where the lines lie.

Mr. GIBSON: We move to strike out the witness's belief where he said, "I believe them to be absolutely correct." He said they were put in there for diagram purposes only. It is an expression of an opinion.

The COURT: Motion denied.

150 The portion in solid pink is the description furnished to me by Mr. Anderson from an answer made by the Southern Pacific Railroad Company, as the lands owned by them, in case #64537.

Q. Are you prepared to state whether or not this map represents the location of those patents and the harbor lines with reference to the lines of Wilmington Bay, as shown by the patent boundaries, and as shown by the exclusion in the San Pedro grant?

A. I am, yes sir.

Mr. ANDERSON: State whether it represents them correctly or not.

Mr. GIBSON: You mean as they actually exist on the ground or as they are shown on the map?

Mr. ANDERSON: I mean taken in connection with the testimony that he has already given.

Mr. GIBSON: We object to the question on the ground that it is incompetent, irrelevant and immaterial, and as preliminary evidence, the testimony is indefinite, in that it is not shown how he compiled it nor from what documents, whether they are true copies or mere memoranda, whole copies, full copies, or only fragmentary portions, and on the further ground the question is indefinite as to whether this is a correct compilation from the data testified to by the witness, or a correct representation of the different lines as they actually exist upon the ground. We are not objecting to this as a
151 diagram. We are objecting to this as evidence of the exact location of the lines on the ground.

The COURT: Objection overruled.

A. That map is a correct compilation of the records.

Mr. ANDERSON: I will show you this U. S. Coast Survey Section 10, map marked plaintiff's exhibit D, and will ask you to observe that portion which shows the west coast of the channel, leading from Dead Man's Island or Timm's Point up into the inner harbor,

and I will ask you if you are familiar with maps of this character? (Said exhibit D is found on page 5, book of maps, filed herewith and made a part of this statement.)

A. I am familiar with maps of this character.

Q. I will ask you what indicates the line of high tide on that?

Mr. McKINLEY: Objected to as incompetent, irrelevant and immaterial, not a matter of expert testimony. It is a matter to be determined from the face of the map and no sufficient foundation laid.

Mr. ANDERSON: Are you familiar with the United States Coast and Geodetic Survey maps?

A. As familiar as most engineers are that have used them.

Q. State if you know, what indicate the boundary of high tide along the channel.

Mr. McKINLEY: Same objection. That must be answered by yes or no I suppose.

152 The COURT: Answer yes or no.

A. Yes sir.

Q. Do you know?

A. Yes sir.

Q. State what you know.

Mr. McKINLEY: The same objection.

The COURT: Objection overruled.

A. It is a heavy line between the portions marked Pacific Ocean or bay and the line indicating the cultivation or other topographical features.

Mr. ANDERSON: I will ask you to observe the immediate aligning of this heavy mark which you have spoken of, and on to the west of it, any portion of the line and the other portion of Timm's Point diverging from it, and I will ask you do you know what that indicates?

Mr. McKINLEY: The same objection.

The COURT: You may answer yes or no.

A. I do.

Q. What is it?

Mr. McKINLEY: Same objection.

Mr. ANDERSON: I think I had better ask that again. Just strike that question out, will you please. Do you notice the heavy shaded or black lines lying to the west of the dark heavy line which you say indicated the high tide line, and some parts adjacent to the high tide line, on the west coast of that channel. State, if you know, what that indicates.

153 Mr. McKINLEY: The same objection.

The COURT: He may answer yes or no.

A. Yes.

Mr. ANDERSON: State what.

Mr. McKINLEY: Same objection.

The COURT: Objection overruled.

A. They represent the bluffs or steep ground.

The COURT: Now indicate to me just what line you are talking about.

A. There is the first line called the heavy tide line. The second line is this wide line, wide or narrow as the case may be.

Mr. ANDERSON: Do you know what line, if any, indicates or what is indicated by the dotted line in the channel immediately east of the high tide line?

Mr. McKINLEY: Same objection.

The COURT: You may answer yes or no.

A. Yes.

Q. What is it?

Mr. McKINLEY: Same objection.

The COURT: Objection overruled.

A. It is the line of low water.

Witness continuing: This line of lower low water, the datum of the United States Geodetic Survey is what is ordinarily known as zero, on the United States Coast and Geodetic Survey. The heavy black line on the exterior portion of the map around what appears to be the bay there is the high tide line. That is true of all
154 United States Survey maps.

Cross-examination.

By Mr. GIBSON:

The difference between a topographic map and a hydrographic map is this: the topographic map will always represent water where it runs to water, where there are bodies of water; but the hydrographic map represents the land under the water. I was not familiar with the United States Coast Survey in 1859. I was not born in 1859. I do not know anything about the actual surveys in that period only as history. The irregular lines on Exhibit D are supposed to represent lines of equal elevation above sea level; that is the method used at the present day and also the historical method.

Q. Do you know anything about the authenticity of the documents from which you compiled the map known as diagram A in this case, other than that they were furnished to you as you have stated?

I myself made a copy of them from the records, with the exception of those which I got outside of the city, which were authorized certified copies of the notes; that is, they have attached to them a copy certified by the proper official, saying that those are true copies. I acted on them as such. That is all that I know about the lines on that map. Whenever I found stakes in our
155 surveys we tied them up. The map of the town of Wilmington called a map of New San Pedro which is in evidence here was used as a basis of that portion of the town of Wilmington

laid out on this diagram Exhibit A, only in so much as it accords with stakes that we actually found on the north side of the inner harbor, Inner bay Exception. Where it did not agree with the stakes, we found no stakes, and we used the record. Of course we followed the map throughout, because where we found stakes that were not on that survey, we did not use them but we did not find all the stakes indicated on that survey of New San Pedro. Where we did not find the stakes we ran a record course; that is, a course founded entirely upon that map, and without field data.

Plaintiffs offered a diagram from the City Engineer's office showing the location of the tide land patents with reference to the Meyler survey. It is a copy of the tracing referred to by Mr. Turner the other day, as the original sheet. These lines were transposed upon the map now offered.

Mr. GIBSON: We object to it as incompetent, irrelevant and immaterial—not on the ground that it is a copy—and upon all the grounds referred to in the objections to the blue print, Exhibit H testified to by Mr. Turner when he was on the stand. My objection does not go to the proposition that there are additional soundings shown on the map, to which Mr. Turner did not testify.

156 The COURT: Objection overruled.

Said map was introduced and filed as plaintiff's Exhibit M. A copy of said Exhibit M is found on page 16 of Book of Maps filed as a part of this statement.

It was stipulated by the plaintiff that it does not claim any of the lands that are embraced within either of the grants to the tracts of land known as Los Palos Verdes Rancho and the Rancho San Pedro, as evidenced by the patents issued by the United States covering said grants.

D. E. HUGHES, a witness called on behalf of the plaintiff, having been first duly sworn, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

Q. Mr. Hughes, you produced this photograph which is before you?

A. Yes sir.

I know who took that photograph, Mr. Brooks, photographer of San Pedro, took this photograph from off the tank stand at Wilmington, the railroad tank stand near Canal street. The body of water shown in the photograph is the inner bay of San Pedro. The photograph was taken in the morning and at the times given at the various places on the several sections of the photograph. I do not remember the date. The date is on the photograph,

157 November 5th, 1908. That is according to my recollection.

The town of San Pedro is shown across the bay in the distance. I saw the plates as they were taken out. I returned home with the photographer and immediately after the plates were developed we sketched the number of the plate, the time of day and

the height of tide. During the time that the photographs were being taken employees of the government on the United States' dredge "San Pedro" read the tide every few minutes and we used their record to determine the heights to put on those plates. This photograph is a copy of the original negative which I saw.

Mr. ANDERSON: We wish to offer the photograph—as a picture of the bay at that time.

Mr. GIBSON: We object to it on the ground it is incompetent, irrelevant and immaterial, and we would like to have the opportunity of cross-examining the photographer who took it.

The COURT: Objection overruled.

(Said photograph introduced in evidence, being plaintiff's exhibit L, in case No. 64536, a copy of which is found in book of maps filed herewith and made a part of this statement.)

This track marked "1" is the track of the Southern Pacific Company.

Mr. GIBSON: I suppose it will be understood that all this evidence relating to the photograph will be subject to our objection and exception.

158 The COURT: Yes.

The WITNESS: This track marker "2" is the track of the Pacific Electric Railway Company. This body of water right west of the railroad tracks is the so-called west basin; that is, anything on the right side of the railroad tracks. The view is south. In fact this view is looking in many directions. You see there are eight photographs taken from the same position, which cover between twenty-five and thirty degrees, so that one to see this from any position would have to turn more than 180 degrees around—a panoramic view. Canal street in Wilmington is marked "3." A little wharf at the end thereof, and a little canal along side of it. The old wharf is nearly south of Canal street. The west basin is marked for identification "4." This line of old piles or pier heads are marked "5" which were just above the water when the photograph was taken. That is important, from the fact that the height of the water can be determined from the height of the piles. Mormon Island is marked "6." San Pedro is marked "7." Terminal Island is marked "8." Brighton Beach Hotel is marked "9." I have nothing else to identify except this elbow from the slough, which is this elbow on the map, at the extreme left side of the picture (indicating the channel at the extreme northerly edge of exhibit A in case No. 64536) this last point referred to is marked

159 "10." The water at the extreme right is that to be seen at the extreme right in the bay as viewed from that tank, and is marked "11." The end of the old government wharf out there is marked "12" and the little canal leading into it is marked "13." The two gable ends of the old government ware house are represented by the dark patches shown on Exhibit H in case No. 64536 (on page 14 of book of maps filed herewith). The photograph was taken from the tank which is marked "14" on said Exhibit H. You cannot see the tank in the photograph. Of course, everything is magnified in the photograph.

I am thoroughly familiar with the bay. I have lived at San Pedro for five years. I am connected with the U. S. Engineer's office here in a subordinate position. I made my first trip to the territory in 1900. I have been acquainted with it for nine years. The dark patches in the bay between the wharf and Mormon Island and between the north shore of the bay and Terminal Island are the tops of sea grass. The dark along the edges represents marsh grass. The white represents water. Over at the western edge of the picture, that is the right hand side, the slightly defined gray and black edges along the water, between the two railroad tracks indicates grass projecting through the water.

Cross-examination.

By Mr. GIBSON:

160 All that I know of the physical characteristics of that harbor, of my own knowledge and observation, has been derived since 1900. This photograph was made for my own use principally. I do not remember now whether these suits now on trial had been commenced at the time that photograph was taken.

Q. Was not that photograph taken for the purpose of these suits?

A. It was not. Not by me.

Q. Have you not been actively engaged in a campaign against the titles to the tide lands delineated within the photograph, and involved in these suits?

A. Well, I have been interested to some extent.

Q. You have attacked the titles and have written articles and caused them to be published in the public papers to the effect that the titles are no good?

A. I have to the effect that I believed that.

Q. And you have cited arguments to substantiate your opinions?

A. I have. I would like to make one explanation—one principal reason for making that photograph at that time—and that is, the reason I had in mind was to furnish the Engineer's Department in Washington with a view of the bay at that time. That was the prime reason. Another reason was that it was for my own personal interest. I don't think I have any photographs that I ever

161 took at low water. I do not remember whether I was present or not when the photograph of the west basin at low water was taken. The late Mr. Crawford took a photograph of the west basin at extreme low tide one time. He was a photographer. He is now dead. He was a resident of San Pedro. I do not remember when it was taken, nor whether I was with him at the time. I remember being with him to select a position from which to take photographs of high and low tide. The photograph he took of the low tide would correctly show it at that stage of the tide, practically. I am quite sure that there is a copy of that photograph in the United States Engineer's office in San Pedro or in Los Angeles. Mr. Crawford died in San Pedro last month. The state of the tide when this photograph Exhibit L in case No. 64536 was taken, was different. The height of the tide is marked on each section: 5.2 feet for the first two sections; 5.1 feet for the third and fourth; 4.8 feet for the

fifth; 4.7 feet for the sixth and seventh; 4.6 feet for the eighth. Those heights being above the plane of lower low water as given by the United States Coast and Geodetic Survey.

Q. What is the mean of all the tides?

A. The mean of all high waters above that same plane is about 5.1, and 4.8 is the mean of all high waters at San Diego. The waters are higher in the inner bay at San Pedro than at San Diego, because the waters get higher as you get up the coast. When you get up to Puget Sound, they are very much higher. The fact that there is such a difference between San Diego and Wilmington is so stated by the United States Coast and Geodetic Survey in the tide tables—that the range is 7 per cent more at San Pedro than it is at San Diego. But for a short rule they say add three-tenths of a foot to the height of high water as given in the tide tables for San Diego to get the height at San Pedro. This is based on the observations made at San Diego,—the tide tables are. By extreme low water as used by me, I meant lower low water of spring tide. When there is a very high tide, there is a correspondingly very low tide. By spring tide I mean one for new moon and one for full moon, making two spring tides in each month, lunar month. There are also two neap tides in each month. The remaining tides have no distinctive name. By neap tides I mean the lowest tides that occur in the month at the time when the moon is on the quarter. Those are the highest low tides. The equinoctial tides occur when the sun is near the equinox, twice a year. The spring tides that occur at those times are the highest spring tides of the year. I wouldn't undertake to say how much higher they are than the lunar spring tides.

163 D. E. HUGHES, recalled on behalf of the plaintiff, having been first duly sworn testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I am in the U. S. Engineer's office. I have been there for six or seven years. I have been in this district for 10 years and in the employ of the department for 16 years in the capacity of civil engineer. For the last ten years I have been employed down and about Wilmington, San Pedro and San Diego. The photograph I hold in my hand depicts a scene of the inner bay of San Pedro. The photograph is taken from the upper porch of a small red building near high water line on Terminal Island, called the boat house. It was taken in the late summer or early fall of last year, 1908. The stage of the tide was about 4.8 feet above mean lower low water as given by the Coast and Geodetic Survey.

I was present when the picture was taken.

Mr. GIBSON: This all comes in under our objection as incompetent, irrelevant and immaterial.

Mr. ANDERSON: Yes. About what space does this purport to cover on the bay?

It covers from the National Lumber Company's wharf on Terminal Island on the left to about the southeast corner of the town plat of Wilmington on the right. Over towards the left in the distance is shown the town of San Pedro. A little farther to the right and farther away San Pedro Hill.

Q. State whether or not that correctly depicts that portion of the bay at the time it was taken.

A. It does, being a photograph.

Mr. ANDERSON: We would like to offer this as an exhibit in case #65230, and ask that it be considered in all the cases, subject to the same objections and exceptions already made. (Picture referred to introduced in evidence being plaintiffs' exhibit O in case #65230.)

This other photograph represents a portion of the inner bay of San Pedro, as viewed from a point near the center of the turning basin. It shows from the second trestle in the Southern Pacific Railroad track north of Smith's Island on the left to Mormon Island on the right. It shows a part of the west basin and shows McDonald's Grove in the distance. This was taken a little later than the photograph I have just testified to and after the tide had fallen some. The tide represented on this picture was practically five feet as near as we could judge it on a gauge that we saw at the time. The dark shading about the middle of the picture and in the water is sea grass on a submerged island projecting through the water at that time. The submerged island or sea grass is located just beyond the rim of the turning basin, the turning basin eats into it a little ways. It is a little west of north, on the northerly side of the turning basin. (Said picture was offered in evidence being plaintiffs' exhibit P in case No. 65230.)

Mr. GIBSON: We object to it as incompetent, irrelevant and immaterial, and taken long subsequent to the time the defendants acquired title from the state.

The COURT: Objection overruled.

Mr. ANDERSON: We ask that it be considered in the other cases subject to the same objections.

It was taken from the upper deck of the government dredge situated near the center of the turning basin. I presume the camera was about 16 feet above the water.

Here is another photograph that also depicts a portion of the inner bay of San Pedro. It was taken at the same time as the last, when the tide was five feet. It shows the bay looking northwestward, northward, northeastward, from the center of the turning basin, from the second trestle in the Southern Pacific railroad track north of Smith's Island on the west, to Terminal Island on the east. That picture was taken from the deck of the pilot house on the dredge perhaps 25 feet above the water. On the left is shown the same sea grass shown on the last preceding picture. Mormon Island is shown in the center of the photograph. The shading south of Mormon Island represents sea grass projecting through the water at that stage of the tide.

166 Mr. ANDERSON: We will offer this as Exhibit Q in case #65230.

Mr. GIBSON: Same objection.

The COURT: Same ruling.

Mr. GIBSON: And the objection goes to all the evidence in connection with the several photographs.

Last photograph was introduced in evidence being plaintiffs' exhibit Q in case No. 65230.

This other photograph was taken the same day after the tide had fallen to a stage of about four feet. The point of view was on the Southern Pacific railroad track on the second trestle north of Smith's Island. The view was taken northwesterly, showing the west basin in the distance, and the trestle of the Pacific Electric Railway Company in the foreground.

Mr. ANDERSON: I offer that as plaintiff's exhibit R in case #65230.

Mr. GIBSON: Same objection.

The COURT: Objection overruled.

Last photograph introduced in evidence being plaintiffs' exhibit R in case No. 65230.

Q. Mr. Hughes, are you familiar with the cost of dredging?

A. In a general way. The government has done quite an amount of dredging since I have been there. The cost to the government in the past few years, with the government dredge, counting in depreciation of the plant, but not the cost of the plant, was
167 between eight and nine cents a cubic yard to perform hydraulic dredging there.

I know the bench mark at Wilmington established by the United States Geological Survey Department. That bench mark has been used by the United States Engineering Department and would be now if occasion arose for it. It is recognized by us as the Geological Bench mark of which we have an elevation by our leveling.

Q. What is that elevation above zero, of the United States Coast and Geodetic Survey?

A. Zero of the United States Coast and Geodetic Survey, as leveled to by the engineer's department from bench marks in San Pedro, is about 9.38 feet above the plane of mean lower low water as established by the United States Coast and Geodetic Survey.

Cross-examination.

By Mr. GIBSON:

The camera that took the photograph, Exhibit O, in case No. 65230, was about 15 feet above the water as it then stood.

Q. Do you know what difference the angle of view makes with regard to the size of an object that is disclosed by the camera and the shadow?

A. All objects that are close by will look much larger in the photograph than the same size object at more distant points. There is a tendency to converge to a focus. The more distant positions are shown on a smaller scale. If carried far enough
168 they converge to one point—the perspective would be. I

was present when these photographs were taken. The first photograph, said exhibit Q, was taken with the tide about 4.8 feet.

Q. Don't you know that that does not give the full view of Mor-men Island or its width?

A. I know that it does not correctly give the dimensions of it in one direction.

Q. Does it give a correct dimension between the two extremes as shown in that photograph lengthwise?

A. It would relatively to other things that are the same distance away from the camera. You would have to determine the distance of those things in order to measure the length of the line in the picture. The angle of vision above the plane of the island is such, that it does not disclose its width. Drop the apex of the angle down to the water level immediately beneath, and you would not change the angle appreciably. I don't know what that distance is across the channel. Perhaps those buildings are close to 1,000 feet away. If one had never seen the island and had no other means of information, he could not determine the shape of the island from the photograph alone, nor the dimensions except in one direction. He could determine one dimension of it, if he knew the distance. Unless he

169 knew that dimension—he could not determine the other dimension. The photographs give a general view of the relation of different objects shown to each other, just exactly what a man would see if he was situated where the camera was, and looking in the same direction.

Q. Now look at this photograph, marked Exhibit O in case #65230, and you will see a boat in the right hand corner of the foreground, which seems to be resting on the soil or mud.

A. That dark, that is shadow.

Q. Is that water or soil?

A. That is water.

Q. Well, how could the keel and rudder be exposed by the shadow of the hull of a boat as reflected in the water?

A. Perhaps it was lying on the ground so that it was elevated part way up.

The little red boat house from which the picture was taken is indicated on Exhibit H in case No. 64536 (being on page 14, book of maps filed herewith) with a small red circle, marked X. We could not tell the exact tide within a tenth of a foot at the time that photograph was taken; on a rough broken natural shore, I could not tell it. I could not tell the actual elevation of the tide within several tenths of a foot, at the time the photograph was taken. That is true of exhibits marked P, Q and R, in case No. 65230 and all the other photographs that I have identified in these causes. I

170 could not take these photographs which show the water and determine the high tide above the ground closely. A person could not take the photographs and locate that high tide line upon the ground unless he was familiar with the locality. We must have some information and data to go by in addition to the photographs. A person could not take the photographs and locate the boundaries of the different tracts of land that are in controversy in these causes.

The bench mark at Wilmington is used by the United States Engineer's office as a means of obtaining levels from which you work; the elevation to be determined by the engineer's department in making a survey. That bench mark is 9.38 above zero, according to the United States Coast and Geodetic Survey Department. The zero is presumed to be, of the U. S. Coast and Geodetic Survey, a mean of all lower, low water, taking the lower of the two tides of each lunar day. It includes the lower of each of two low waters, occurring in every lunar day of the year or series of years, and no other tides. Zero is the mean of the lower of two tides of each lunar day for a year or series of years. It includes the lower low spring and lower low neap tide and the lower lowest of all the tides between the two. I don't know what steps were taken to determine it at San Pedro. We know from the United States Coast and Geodetic

Survey records which are furnished to the engineer's department that those certain bench marks are in San Pedro and they give the height of those bench marks above the plane of zero. That is all I know of my own knowledge. There is a letter

in the United States Engineer's office from the superintendent of the Coast and Geodetic Survey giving that information. The Engineer's department here takes the bench marks used by the Geodetic and Coast Survey as the basis of their work. Of course, the engineer's department has made many tidal observations on its own accord while making surveys; but it has not sufficient data to determine all those planes for itself independent of the information furnished by the United States Coast and Geodetic Survey. Tidal observations were made at San Pedro in or about the year 1875, on a tide gauge on the railroad wharf. I don't know whether it was for the United States Coast and Geodetic Survey or for the U. S. Engineering Department. My understanding of the reading of that record is that the plane of zero from which we work was ascertained from those observations and not from observations taken elsewhere and corrected to the San Pedro locality. The observations taken at San Pedro were not nearly of so long duration as at San Diego. The observations at San Diego consumed more than three years. They have taken San Diego and San Francisco and Astoria

as being the primary stations on the California and Oregon coasts. My recollections from reading the record was that observations taken at San Pedro extended over about three months. I presume that they read the tide at all stages, both highest and lowest of all the days. I don't know. Such a number of observations would not be sufficient to determine the plane of lower low water, zero and the elevations above that, but would determine them approximately. The records speak of the readings being taken at San Pedro with the gauge on the railroad wharf. I don't know whether they were taken at Mother Martin's Point in 1872 or not. I don't think the record says where they were taken. I could not give you the figures without observations at the different places as to what difference there would be in the plane at Wilmington and San Pedro. They would not be uniformly the same. It would require considerable observation to determine it with exactness. I

could not tell it without actual observation within several tenths of a foot. I could tell within nearer than several tenths of a foot with a very few observations.

Q. Within how many inches could you come?

A. Well, if we were to observe one tide at the times that the tides were very slack, when the lower high is but little higher than the higher low, you probably could get a water level that would be correct throughout within less than one-tenth of a foot.

Q. I mean, actually on the ground as it would spread
173 out on the ground at different places—some places an inch in depth would make a great difference in the surface.

A. It would make a difference—in some cases it would make considerable difference. The wind makes a great difference sometimes in driving a tide up. The lowest tide that I have observed at San Diego is a little more than two feet below zero, but that was a tide that fell below the prediction quite a little. The tides do not and cannot always agree, with the predictions. They vary from it, on account of the winds and on account of local barometric pressure, as compared with the pressure at some distance away. If the barometer remained at 30 in one place and 28 in another, it would make a difference of slightly more than 2 feet. 30 inches on a barometer balances about 33 feet of sea water. As a matter of fact, tides vary in this locality according to varying conditions, pressure, wind and so forth. Of course, the greater number of days in the year the conditions are nearly normal. If one attempted to go out and ascertain the exact height of the tide on the ground without taking into consideration these conditions he might be misled as to the height of the water if he made just a single observation. He could not be certain from any one observation—he would not know whether there was an abnormal tide that day. Of course, if it was a calm

174 state of the water, and it was not affected much, if any, by the wind, then he would be reasonably certain that the conditions were at or nearly normal.

Q. I want to ask you one question, and that is in regard to the different planes used for ascertaining levels by the hydrographic department and the geological department. What is the difference?

A. The hydrographic department of Great Britain uses the low water of spring tide as the plane of reference from which they measure and record their soundings. The United States Coast and Geodetic Survey uses on the Atlantic and Gulf coasts the mean of all low tides. The same department on the Pacific coast, except Puget Sound, and I do not know about Alaska, uses the mean of the lower low waters. In Puget Sound the same department uses a plane of about two feet below that, which is approximately the plane of the low water of the spring tides.

In this locality—the Geological Survey—I don't know about elsewhere—uses mean sea level. Mean sea level is the level at which water would be if there were no tides—That is, its theoretical level. I think that it is in the neighborhood of three feet above the plane of zero of the Coast and Geodetic Survey in this locality. I cannot give the exact figures from memory. I am of the opinion it is 2.9

175 feet at San Diego, but I do not like to testify to the exact figure from memory. It will be a little more at San Pedro if it is 2.9 feet at San Diego.

It is difficult to answer what would be the difference between the lowest low tide at San Diego and the lowest low tide at San Pedro. It is the mean sea level that is presumed to be at the same absolute level at both places. I think the tides at San Pedro have a greater range than they have at San Diego, and therefore some of the range is below as well as above the plane of mean sea level, which would make the low water a shade lower at San Pedro than at San Diego, and the same reason applies as affecting the mean or lower low water, which would be a little lower at San Pedro than at San Diego.

The range of tides is different from the rise of tides. The rise of tides is the height above the datum plane, while the range of the tide is from low water to high water, and it is the range which is seven per cent greater at San Pedro than at San Diego. So, theoretically, the half of that seven per cent would be above sea level, three and a half per cent above sea level and the other three and a half per cent below sea level. It is found, however, by accurate leveling, that mean sea level is not constant at all places. I think the lowest predicted, and with a very high barometer at San Pedro, and with the wind blowing continuously from a direction, it would make the tides almost that high.

176 Redirect examination.

By Mr. ANDERSON:

Q. I will call your attention to some shading on the photograph Exhibit O in Case No. 65230, which lies south of the boundary of Mormon Island, just beyond the boat which appears in the channel to the right of the little wharf as shown in the picture, and ask you what that represents?

A. I cannot answer as to all of that. I know that a portion of it is due to these grasses projecting through the water, at that stage of the tide. Without having levels on the land, I don't know whether any of the land projects above that water or not. I will indicate that shading on map, in case No. 64536, by a double X.

The photographs testified to by Mr. Hughes were introduced in evidence by the plaintiff.

Mr. GIBSON: Defendants object to said photographs and each of them as incompetent, irrelevant and immaterial and taken long subsequent to the time defendant, acquired title from the state.

The COURT: Objection overruled.

(Said photographs were thereupon introduced in evidence and marked plaintiff's Exhibits O, P, Q and R, respectively, and are found on page —, Book of Maps herewith filed as a part of this statement.)

177 EARNEST G. HAMILTON, a witness called on behalf of the plaintiff, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I reside in Los Angeles and have resided there about four years. Before that my legal residence was California, but I was in the employ of the United States Government, and as such was travelling all over the country including Alaska. I lived in Long Beach—in the summer time—for three or four months at a time, in 1885, 1886, 1887. I am connected with the city engineer's office at present. I made a topographic survey of parts of the inner harbor, inner bay of San Pedro, during the last year. I made a survey of a portion of tide land location No. 57. These surveys were finished the Friday before the suit was begun in court. I was engaged approximately two months before that. This was under the orders of Mr. Hamlin, City Engineer. The basis of the survey for elevation was a bench mark opposite the railroad depot in Wilmington. There is an iron pipe there which is the bench mark of the United States Geological Survey, and the city engineer told me that the elevation to use at that bench mark was the elevation as furnished by the Coast and Geodetic Survey, which would be 9.37 feet above mean

lower low water. Taking that as a basis, I made a contour
178 map of the area which he told me was to be embraced in the surveys shown on this map, and the elevation of the lines, what you might call the shore lines, for the elevation of plus 1 foot, plus 1.7 feet—four—and several others, and several other contour lines. By plus one foot I mean 1 foot above the mean lower low water, which is called zero; the same expression that is used by the United States Coast and Geodetic Survey as the basis of their chart. We used the usual method of making contour maps, running each contour out, setting the rod on the land, and running the levels around the whole length, where there were no breaks in the levels. Then we ran each point where the shore line would be approximately straight—we would take the readings. Where there were bends, we would take readings one right after the other so we could connect up, to show a complete contour map. I did the work of making the map myself in the field. I compared the results of my work from time to time with the tide gauge in the bay, to this extent; of course we had to work with the tides very often, in fact all of the time, to advantage. When the elevation was about say four feet, it is very difficult to tell where the shore line would be, what is above four feet and what is below four feet. In order to get the map as near accurate as possible, we waited for the tide and when the tide showed probably four feet, we would run around those little areas as

179 quickly as possible to show the little islands above four feet; so it showed the levels we were carrying as practically the same as the elevation given in the book of tides furnished by the United States Coast and Geodetic Survey. I prepared the map entitled "Topographic Map of a Portion of Tide Land Location #57,

showing a part of the extreme northeast corner of said location, with the exception of the harbor lines. I did not plat the harbor lines. That was the result of a portion of my labors at that point.

Q. I will ask you to describe what is meant by the various signs and markings upon that map.

A. The lines are the shore lines that the elevation of that line ran—they are shown as the elevations are shown on that one—the elevation of one foot, 1.7 and so forth. The heavy black line, with yellow, is the line of the tide land grant, I think, #57. The dotted lines are lines of the connecting stakes on the ground, which are carved "I. B."—I. B. #11, 12, 13, and so forth. I refer to the penciled dotted lines. (Ex. N.) I was told that these were lines of the inner bay exception grant. These stakes were placed on the ground there and were the basis of my work. The red lines were put on by another draftsman and I was told that they were the harbor lines established by the government. The lines other than the tide land patent lines and the harbor lines and the dotted line that you
180 have referred to there, correctly show the topography of that ground.

Plaintiff thereupon offered in evidence the map testified to by the witness as plaintiff's Exhibit N. (Same is found on page 21 book of maps filed herewith and made a part of this statement.)

Cross-examination.

By Mr. GIBSON:

I do not know anything about the stakes to which I referred of my own knowledge or what they represented. I do not know who set those stakes out. I don't think I was told. I was told to tie on to those stakes, that they would be common points where the surveys that the city engineer would make would be based upon for future use. I do not know whether those stakes represent the true position on the ground with reference to any ranch lines. I did not check them up with any physical objects round there or round the old ranch lines in any respect. The line that joins those stakes on my map agrees with the platted lines which represent the boundaries in Mr. Merwin's notes of the ranch survey. I made the comparison. I did not compare it with the old map of the ranch, I had Mr. Merwin's notes simply. Mr. Merwin furnished me with a copy of the notes which he said were a certified copy of the notes of the ranch of the inner bay exception line, and the angle as
181 represented by those notes correspond to the angle as represented between the lines on my map, which angle was measured graphically with the map on the ground. I did not run the old ranch lines to check up on the survey. I do not know whether there is a dispute as to the true location of what I referred to as the inner exception line. My contour lines are based on a bench mark located in front of the railroad depot at Wilmington, which I referred to which is referred to in the United States Geological Survey reports, but the elevation I took is not the United States Geological Survey elevation. The city engineer gave me the eleva-

tion of 9.37 feet above mean lower low water as he told me. There is a difference between the elevation used by the United States Coast and Geodetic Survey, and the United States Geological Survey. In projecting topographic surveys for the United States Geological work you take the mean level of the sea, and for hydrographic surveys you take the plane of lower low water; that is what is referred to as zero. My survey is based upon certain bench marks and everything has relation to that starting point; and compared with the elevations of the water at certain tides for a check, to see that I had not made a mistake after I had left my original base. The contour lines do not purport to show the lines of various tides or stages of the tide, but the shore line at a certain elevation above my datum plane.

What I mean by shore line and contour line are the same.
 182 A contour line is supposed to represent a shore line for a certain elevation.

Q. Could we take this shore line and ascertain the mean lower low tide line and the ordinary high tide line, and the line of extreme high tide?

A. If the extreme high tide corresponded to an elevation of 5.8 and that elevation is run there, they would be identical.

Plaintiff then renewed the offer of the said map in evidence and the defendant objected to the same on the ground that it was incompetent, irrelevant and immaterial and made long subsequent to the issuance of the patent in this cause.

The COURT: Objection overruled.

The WITNESS: I made a survey of I imagine perhaps 35 or 40 per cent of tide land location #57. I did not notice with respect to the total area. The engineer furnished me a little sketch map of the basin and told me to cover certain areas.

Mr. ANDERSON: I will state that they relate particularly to those grass plats that are not covered by the Meyler surveys.

The WITNESS: I made the map marked plaintiff's Exhibit O (with the exception of the harbor lines) as a result of that survey. It shows a portion of Wilmington and a part of tide land locations Nos. 152 and 153. I put on the patent lines.

(Said map is found on page 22 of the book of maps filed herewith and made a part of this statement.)

183 Mr. GIBSON: Defendants object to the introduction of the map Exhibit O in evidence on the ground that it is incompetent, irrelevant and immaterial and made long after the issuance of the patent to the land involved in this case.

The COURT: Objection overruled.

The WITNESS: I made the survey in the same way that I described in making Exhibit N. At the same time, they were all continuous. I would work on one piece as the tide permitted, and another piece as the tide permitted. The lines shown upon this map—the blue lines—correctly show the contour of that portion of the bay one foot above mean lower low water.

I made the map Exhibit P, with the exception of the grant lines here, which I did not plat on the maps. They were placed in there by Mr. Merwin, I believe. (Said map found on page 23, book of maps filed herewith and made a part of this statement.)

I made the survey on the field in the usual method of making contour maps. The elevations are based upon the datum plane of mean lower low water as zero as used by the United States Coast and Geodetic Survey. The lines represented upon that map as contour lines clearly show the contour with reference to that zero point of the lands shown on the map. The contours that show on 184 that map are numbered 1, 1.7, 4, 4.5. They all refer to the elevation in feet above zero. None of the lines are below zero.

MR. GIBSON: Defendants object to the introduction of said map Exhibit P in evidence on the ground that it is incompetent, irrelevant and immaterial and made long after the issuance of the patent involved in this cause.

THE COURT: Objection overruled.

I think there is a channel leading directly from Wilmington Bay to Long Beach. There used to be. I have not been over lately. I am told there is.

I am familiar with the little channels. There is a main Wilmington channel as shown on Exhibit M leading up towards Long Beach. Boats are used in other channels through tide lands location #152. The channel I refer to is the channel starting at the angle in the blue line on the southeast side of tide land location #152; thence to a point known as the harbor line point, at an acute angle north of the point that I started from; thence through a channel between the dotted blue lines on this map; that eventually connects the main channel at the northeast quarter of tide land location #152. The tide would perhaps be the ordinary tides. I don't know that I ever noticed them at the dead low, but a little while before that. I saw some of the smaller boats run through there; the smaller gasoline launches—launches about fifteen feet long.

MR. McKINLEY: Do you know whether it was in one of 185 those channels, Mr. Hamilton, that the President was being conducted by the city authorities when the boat stuck in the mud day before yesterday?

A. I don't know sir where they were.

Q. Do you know how much dredging there was in that channel at Long Beach?

A. No sir, I do not.

ERNEST G. HAMILTON, recalled.

Direct examination.

By MR. ANDERSON:

Mr. Hamilton, I show you a little map, which will be marked Plaintiff's Exhibit Q, for identification, being a topographic map of

a portion of tide land location 57 and 144, and I will ask you to state what it is? (Said map found on page 24 of book of maps filed herewith and made a part of this statement.)

What is shown upon that map, Mr. Hamilton?

The contours or the tide land location lines—portions of the tide land location No. 144 and 57, that is the extreme northeast portion of tide land location #144. This map was prepared by me based upon surveys which I have testified to already. I used the same datum plane and made the map in the same manner that I made the other surveys and maps. The contour lines shown upon this map correctly show the contour lines of the land above the datum
186 plane. The datum plane is zero as used by the United States Coast and Geodetic Survey.

Mr. GIBSON: Defendants object to the testimony of the witness and to the introduction of the map on the ground that they are incompetent, irrelevant and immaterial and made long subsequent to the issuance of the patent to the land in controversy in this case.

The COURT: Objection overruled.

The COURT: Mr. Anderson desires to present some statistics from reports.

Mr. ANDERSON: I do not care about going through the years. We have statistics showing the number of vessels, steam and sailing that were incoming and outgoing, for the year 1871. That was the year the improvements by the government began. It is taken from one of Capt. Meyler's reports. Such report shows that the work of improvement of the San Pedro channel by the United States was begun in the year 1871.

It was shown that the United States has expended in the development of the San Pedro channel and in constructing breakwater in the outer harbor and in constructing seawalls in the inner harbor and in other improvements in the inner harbor from 1871 to the time of commencement of this action a sum in excess of \$5,000,000, more than \$3,000,000 of which has been expended in the construction of breakwater in the outer harbor.

187 The COURT: You can read the figures into the record subject to the objection that they are incompetent, irrelevant and immaterial.

Mr. ANDERSON: Just the figures. Commercial statistics for the year beginning 1871, referring to the vessels coming and going at the Port of Wilmington. Vessels, sailing, incoming, 65; outgoing, 65. Vessels, steam, incoming, 160; vessels, steam, outgoing, 160. Total, 225 incoming and outgoing. Freight, tons, 25313 incoming; 9575 outgoing. Lumber, feet, incoming, 10,938,336. The report further shows that in 1898 the amount of freight was increased to 452,637 tons. And we wish also to offer from a report of December 4, 1908, showing the total tonnage on December 31, 1906. This is from the collector of customs' office in Los Angeles, Cal. Commercial statistics for the year ending December 31, 1906: Vessels, foreign commerce, incoming, 3; outgoing, 3. Domestic commerce, incoming, steam vessels, 1009; outgoing, 1005. Sailing vessels, for-

eign, incoming, 7; outgoing, 7. Domestic commerce, incoming, 401; outgoing, 402. Total tonnage, foreign commerce, incoming, 12,564; outgoing, 12,564 tons. Domestic commerce, total tonnage, incoming, 629,592; outgoing, 628,374. That includes lumber and everything. Do you care for the particular items?

Mr. GIBSON: No sir.

Mr. ANDERSON: I will simply state that the greatest items
188 are incoming lumber and outgoing asphalt, and covers general merchandise and various articles of commerce. Also, for the purpose of showing at what time the improvements began at the harbor of San Pedro, I wish to offer a short extract from the report of Mr. Meyler of March 31, 1890.

It was stipulated that the 225 vessels which are reported to have come into San Pedro in 1871 anchored outside in the roadstead.

It was stipulated, that, on behalf of the plaintiff that after the construction of the railroad to San Pedro that all the shipping was done at San Pedro and the wharfs at Wilmington were not repaired or rebuilt; and that occasionally when the wharfs at San Pedro were crowded sometimes a light draft boat would run up the channel to Wilmington. They were light draft schooners.

It was stipulated by the respective parties in this action that the area in the west basin, outside of the harbor lines, which is designated for water ways, is 210 acres; and in the middle channel 40 acres; and in the east basin 230 acres, making 480 acres sought by the War Department by the establishment of harbor lines for water way purposes or channels; that the entire area of tide land locations in the inner basin, both east and west basin is 1194.71 acres, of which 480 acres sought to be taken for channel purposes is 40%
189 of the total area of tide land locations. From the area above

stated sought to be taken for channel purposes should be excepted whatever area lies within the harbor lines of tide land location #154, the action involving that location having been dismissed.

It was also stipulated that the area above mentioned did not include Mormon Island which contains 18.88 acres; it was further stipulated that no dredging had been done above the turning basin by the government as shown on Exhibit H but that whatever had been done and is now in progress is being done by private parties, defendants herein and at their own expense.

It was stipulated that the United States Government dredging for harbor purposes in the turning basin is to a depth of 24 feet below zero as shown in Exhibit Map H.

It was stipulated that if Mr. L. C. Easton were present in court and were interrogated on the matter he would testify that the harbor lines of San Pedro inner and outer harbor established by the Secretary of War, July 29th, 1908, show a total frontage along the harbor line both of the inner and outer harbor of approximately 26 miles.

Plaintiffs introduced in evidence over the objection of defendants as to its relevancy and competency a report of W. S. Marshall,

190 chief engineer of the United States Army, of the War Department recommending the appropriating of money to dredge the entrance to San Pedro inner harbor and inner harbor channel to and including the turning basin to a depth of 30 feet below zero.

It was stipulated on behalf of the plaintiff that as fast as the lines between the pier head line designated for water ways by the United States Government as indicated by the harbor lines fixed by it within the inner basin is removed by dredging that the land not within the channels but adjacent thereto will be suitable for general shipping and commercial purposes.

It was admitted on behalf of the plaintiffs that all the corporations, defendants herein, are duly organized and existing as corporations.

The defendants then introduced in evidence the order of the Board of Supervisors incorporating San Pedro, filed in the office of the Secretary of State, March 1, 1888.

The defendants then proved the proceedings had and taken by Phineas Banning for the purchase of the lands in controversy in this suit, being the lands embraced in tide land location No. 57, resulting in the issuance of a patent for said land by the state of California to said Banning, on December 16th, 1881; and as a part of said proceedings, defendants introduced in evidence the affidavit and application of said Banning, dated February 15, 1866, stating, among other things, that he desired to purchase, under the
191 provisions of the act entitled, "An Act to provide for the sale of certain lands belonging to the state," approved April 27, 1863, the lands described in said affidavit and application, embracing the lands in controversy in this suit, which said affidavit and application was filed in the office of the County Surveyor of Los Angeles county on February 15th, 1866, and a copy thereof was filed in the office of the Surveyor General on April 2nd, 1866, together with a duplicate of the survey, plat and field notes of the survey of said land, made by said County Surveyor, pursuant to the application of said Banning.

Said affidavit and application, and survey and field notes so introduced in evidence were made in conformity to and contained all the matters and things required by said act of the legislature of the state of California, approved April 27, 1863, to entitle said Phineas Banning to have said application and survey approved by the Surveyor-General as provided in said act; if said lands were subject to sale under the provisions of said act; and the defendants proved that said Phineas Banning duly took and subscribed the oath required by Section 28 of said act of April 27, 1863, and caused the certificate of said oath to be purchased by said application, embracing the land of said oath to be indorsed on the description of the land sought to be purchased by said application, embracing the land in controversy in this suit, and the same to be filed on the
192 11th day of March, 1866, in the office of the recorder of said county of Los Angeles in conformity to the provisions of Section 29 of said act of April 27, 1863, and a certified copy of said de-

scription and oath so filed in the office of the County Recorder on the 11th day of March, 1866, to be filed in the office of the State Register on the second day of April, 1866.

Defendants also introduced in evidence the demand made on behalf of Phineas Banning for the approval of said application of April 2nd, 1866, for the purchase of the lands in controversy in this suit, which demand was filed with the said Surveyor General on November 16, 1877; and also introduced in evidence an amended application made by said Phineas Banning to purchase the lands in controversy in this suit, together with the affidavit of said Phineas Banning accompanying said application and the certificate and field notes of the survey of said land attached thereto and made for the purposes of said application by T. J. Ellis, County Surveyor, said application, affidavit and certificate being dated December 18, 1877, and filed in the office of the County Surveyor of the county of Los Angeles on said date and in the office of the Surveyor General of the state of California on the 2nd day of January, 1878.

Said affidavit and application to purchase, and said survey dated December 18, 1877, were made to correct an error in the
193 former survey made for Phineas Banning, the field notes of which former survey were filed in the office of the County Surveyor on said 15th day of February, 1866, and the same were made in conformity to, and contained all the matters and things required to entitle said Phineas Banning to have said application and survey approved by said Surveyor General, under the provisions of the Political Code of the state of California, and of said act of April 27, 1863, and of the act of the legislature of the state of California, entitled, "An Act to provide for the management and sale of the lands belonging to the state," approved March 28th, 1868, and the acts amendatory thereof or supplemental thereto.

The defendants then introduced in evidence the certified copy of the decree rendered and entered on November 28, 1879, in the case of James McFadden v. Phineas Banning, et al., No. 4434, in the District Court of the 17th Judicial District, filed in the office of the Surveyor General pursuant to the provisions of the Political Code on the — day of —, 18—, being the same decree set forth in the amended answers of the defendant Banning Company and other defendants in this cause.

The defendants then introduced in evidence the certificate of approval, in due form, of the Surveyor General of the state of California, made pursuant to that decree, dated at Sacramento,
194 February 25, 1880, of the said application of Phineas Banning to purchase the lands in controversy in this suit, filed in the office of said Surveyor General April 2, 1866, and the said amendatory application of said Phineas Banning to purchase said land in controversy in this suit, filed in the office of said Surveyor General, January 2, 1878.

Defendants proved that said Phineas Banning paid to the County Treasurer of Los Angeles county, on the 5th day of March, 1880, the sum of \$121.55, being 20 per cent of the purchase price and advance interest on the balance of the purchase price of the lands embraced in said location 57, being the lands in controversy in this suit; and

on the 1st day of October, 1881, paid to said County Treasurer, the sum of \$399.45 in full and final payment of the purchase price of said lands, together with interest thereon, as required by law.

Defendants then introduced in evidence the certificate of purchase in due form, issued by said Surveyor General and Register of the Land Office, to said Phineas Banning, for said tide land location No. 57, embracing all the lands in controversy in this suit, dated April 10, 1880.

Defendants also introduced in evidence the certificate of said Register of the Land Office of the state of California to the Governor of the state in due form, certifying, among other things, 195 that full payment has been made to the state for the lands embraced in tide land location No. 57, being the lands in controversy in this suit, and that said Phineas Banning is entitled to receive a patent for the said land.

Defendants then introduced in evidence the patent of the state of California, to Phineas Banning, in due form, and duly executed, dated December 16, 1881, purporting to grant and convey to said Banning the lands embraced in said tide land location No. 57, being the lands in controversy in this suit; which said patent recites that the Legislature of the state of California has provided for the sale and conveyance of the tide lands belonging to the state by statutes enacted from time to time; and, that it appears by the Certificate of the Register of the State Land Office No. 189, bearing date December 16th, 1881, that the tracts of tide land therein granted have been duly and properly surveyed; that full payment has been made to the state for the same and that Phineas Banning is entitled to receive a patent therefor, all the requirements of the acts of the state legislature in relation to tide lands having been fully complied with.

It was admitted on behalf of plaintiffs, that said Phineas Banning possessed all of the qualifications required of purchasers of any 196 class of state lands, and that all acts and proceedings made and taken by said Banning, and by the several public officers, in the matter of the purchase of the lands embraced in said tide land location No. 57, to and including the issuance of said patent therefor, duly complied with all the requirements of law relating, or purporting to relate, to the sale of said lands, and that said Banning made all payments required by said laws, including the payment of the fees of said officers for the filing and issuance of papers, the making of surveys, and other services performed by them in the course of said proceedings, at the respective times that such papers were filed or issued, surveys made, or services rendered; but plaintiffs do not admit that said proceedings for the purchase or patenting of said land, were authorized by any law of the state of California.

Said lands throughout said proceedings are described as "State Tide Lands."

The defendants then offered in evidence the order made by the Surveyor General of the state of California referring to the District Court of the 17th Judicial District, the contest by J. McFadden of the application of said Phineas Banning, to purchase the lands in

controversy in this suit made and entered by the said Surveyor General on the 20th day of February, 1878, in conformity with the provisions of Section 3414 of the Political Code, which said order is in substance as follows:

197 "In the matter of the conflicting applications of Phineas Banning and James McFadden to a certain tract of salt marsh and tide lands, situate in the county of Los Angeles, state of California, and more particularly described hereafter:

On April 2nd, 1868, an application in the name of Phineas Banning to purchase the fractional South $\frac{1}{2}$ and N. E. $\frac{1}{4}$ of Section 5, Fractional south $\frac{1}{2}$ of Section 6, fractions of the four quarters of section 7, and fractional north $\frac{1}{2}$ of Section 8, in T. 5 S. Range 13 West, San Bernardino Base and Meridian was received and filed in the office of the State Surveyor General.

On November 9, 1877, and application in the name of James McFadden to purchase the fractional South $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and fractional S. W. $\frac{1}{4}$ of Sec. 5, T. 5 S. R. 13 W., S. B. M., was received and filed in the office of said surveyor general.

On January 2, 1878, Phineas Banning, the applicant first above mentioned, filed an amendatory application to purchase the fractional portions of the above described Sections 5, 6 and 7, in the office of said Surveyor General.

On Jan. 29th, 1878, the Southern Pacific Railroad Company filed in the office of said Surveyor General its claim to a right of way and depot grounds on a portion of the said S. W. $\frac{1}{4}$ of Section 5, 198 T. 5 S. R. 13 W., S. B. M., under Section #277 of the California Codes. Statutes continued in force.

It is therefore ordered and decreed that the said parties be and they are hereby referred to the District Court of the 17th Judicial District of the state of California in and for the county of Los Angeles, for a final determination of said conflicting claims.

State Surveyor General's Office, Sacramento, Feb'y 20th, 1878.

WM. MINIS,

State Surveyor General."

The defendants also offered in evidence the judgment roll in the case of James McFadden v. Phineas Banning and the Southern Pacific Railroad Company, #4434, in the District Court of the 17th Judicial District. Said judgment roll contained the complaint filed by James McFadden on April 19, 1878, in said case, said complaint being in substance as follows:

Plaintiff alleges:

1st. That desiring to purchase certain Tide Lands hereinafter described, of the state of California, which said land had been segregated by the authority of the United States but which had not been sectioned by the same authority, he did on the — day of —, 1877, apply to the Surveyor of Los Angeles county, in which county said lands were situate, to have said lands he desired to purchase, surveyed.

199 And in pursuance of said application said County Surveyor surveyed said lands and in his said survey conformed as near

as possible with the system adopted by the United States for the survey of public lands.

2nd. That on or about November 9th, 1877, he made and filed in the office of the Surveyor General of this state, his affidavit that he was a citizen of the United States, a resident of this state, of lawful age, and desired to purchase the land hereinafter described under the law providing for the sale of swamp, overflowed and tide lands, and that he did not know of any valid claim to the same other than his own, to which affidavit was attached the certificate of the surveyor of Los Angeles county that he made the survey of said lands hereinafter described pursuant to application of plaintiff, as herein alleged; that the lands described in said affidavit and so applied to be purchased is part of the Fractional South $\frac{1}{2}$ of North west $\frac{1}{4}$ and fractional south west $\frac{1}{4}$ of section 5, T. 5 S. R. 13 W. in Los Angeles county, state of California, particularly described as follows:

Beginning at the point of intersection of the North and South line Section line of Section 5, T. 5 S. S. R. 13 W., S. B. M., thence S. between Sections 5 and 6 and the East and West line of the quarter 42° E. 11.80 chs. along the line of ordinary low water or low tide; thence S. 3° 14' E. 9.49 chs., thence S. 28° 17' E. 5.50 chs.; thence S. 15° 01' W. 9 chs.; thence N. 76° 06' 6.50 chs.; thence N. 32° 06' E. 19.70 chs.; thence N. 51° 14' E. 5 chs.; thence N. 67° 23' E. 4.20; thence N. 7.90 chs.; thence along the line of San Pedro Rancho N. 70° 22' W. 10.20 chs.; thence N. 74° 06' W. 11.95 chs.; thence N. 6.25 chs.; thence N. 74° 22' W. 8.15 chs.; thence S. 78° 04' W. 4.66 chs.; thence South 14 chains to point of beginning, containing 76.80 acres.

3rd. That said lands are tide lands above low tide.

4th. That the defendant Phineas Banning on the 2nd day of April, 1866, filed in the office of the Surveyor General his pretended affidavit and application to purchase of the state of California a part of fractional South $\frac{1}{2}$ and North East $\frac{1}{4}$ of Section 5, fracs. South $\frac{1}{2}$ of Section 6; fracs. of the four quarters of Sections 7 and 5, North $\frac{1}{2}$ of Section 8, T. 5 S. R. 13 West, S. B. M., which said lands so applied to be purchased are particularly described as follows:

(Here followed the description of the lands as set forth in said application of Phineas Banning embracing the lands in controversy in this suit.)

5th. Plaintiff alleges that said affidavit and application so made by said defendant Banning was and is defective and void and that said lands so applied to be purchased are not tide lands above low tides and that a part of the lands in said application described as hereinbefore alleged, was at the time and is now within the limits of valid Mexican Grants, and belongs to private individuals, and the state of California had not then and has not now any interest or estate therein, and that a large part of said lands so applied to be purchased is below low tide and that said description is unintelligible, uncertain and indefinite; and said lands by said description cannot be located; and,

Plaintiff further alleges: that the affidavit and application made by said defendant in his said application to purchase said lands,

does not state the facts required by law and the same is not verified according to law, and said application is not made according to law.

6th. That subsequent to the making and filing of the affidavit and application of plaintiff to purchase the lands hereafter described, as herewith alleged, the defendant Phineas Banning on January 25th, 1878, made and filed in the office of the Surveyor General of this state his amendatory application (so called) whereby he applied to purchase of the state the following described lands to-wit:

(Here follows the description of the lands set forth in said application of Phineas Banning embracing the lands in controversy in this suit.)

6th. That the Southern Pacific Railroad Company is a corporation, etc.

202 7th. That said railroad company, on January 29th, 1878, filed in the office of the Surveyor General of this state, its claim to a right of way and depot grounds on a portion of the S. W. $\frac{1}{4}$ of Section 5, T. 5 S. R. 13 W., S. B. M.

That said claim was filed subsequent to and is subject to the application of plaintiff to purchase said land.

8th. That on February 19th, 1878, plaintiff made demand of the Surveyor General of the state that the contest arising herein upon the respective applications of the parties hereto to purchase the lands as aforesaid be referred to the proper court for judicial determination.

9th. That on February 20th, 1878, said Surveyor General made his proferit in writing referring the plaintiff and defendant to the District Court of the 17th Judicial District of the state of California, in and for the county of Los Angeles, for a final determination of their said conflicting claims, a copy of which said proferit is hereto attached and hereby made a part of this complaint.

Wherefore, plaintiff prays:

1st. That the courts will hear and determine the conflicting claims of plaintiff and defendants to purchase the lands described in the application of plaintiff to purchase of the state as in the complaint alleged.

203 (2) That the court will order and adjudge that the plaintiff has the best right to purchase said lands.

(3) That the plaintiff recover his costs.

(4) That plaintiff have such other and further relief as may seem just and equitable.

BICKNELL AND WHITE,
Attorneys for Plaintiff.

(Complaint verified.)

Said judgment roll also contained annexed to said complaint certified copy of said proferit or order of reference of the Surveyor General made and entered on February 20, 1878; and also contained the answer of Phineas Banning filed in said cause November 26, 1879, in substance as follows:

"Denies each and every allegation in the complaint, except as contained in the 4th and 6th paragraphs thereof, which he admits and alleges to be true, and for further answer says:

That this application referred to in the complaint was made in good faith and in all respects in conformity with the provisions of law, and that he is entitled to purchase the lands therein described.

GLASSELL, SMITH AND SMITH, *Attorneys.*"

Said judgment roll also contained the answer of the defendant Southern Pacific Company, filed in said case on November 26th, 1879, which answer is in substance as follows:

204 "Denies each and every allegation in the complaint, except as contained in paragraphs 4th and 10th, the allegations in which they admit and allege same to be true.

Defendant Southern Pacific Company alleges that prior to January 29th, 1878, said defendant selected the tract of land described in plate hereinafter referred to as a site for their depot and other buildings and road bed, and located, occupied and held and ever since has occupied and held said tract of land for those purposes, and on January 29th, 1878, caused the same to be accurately surveyed and transmitted to the Surveyor General and to the Controller of the state and to the recorder of the county of Los Angeles, correct plats of the location of said railroad and site and of the tract of land so selected, and said plats were duly received and filed by said officers respectively.

That said tract was and is necessary for the use of said corporation for the purposes aforesaid.

GLASSELL, SMITH & SMITH,
Attorneys for said Defendants."

Said judgment roll also contained the findings filed in said cause on November 28th, 1879, being in substance as follows:

"This cause having been duly tried and submitted, and the Court having fully considered the same, finds the facts to be as follows:

205 First. The application of the defendant Banning, referred to in the complaint was duly made and the allegations contained in paragraph 5th of the Complaint are all untrue, and under and by virtue of said application the said Banning is entitled to an approval of his survey and application as to all of the land described in his amendatory application of Jan. 2nd, 1878, except the tract of land described in the next finding and also subject to the title of the Southern Pacific Railroad Company as set forth in the 3rd finding; with said exception and reservation the said Banning is entitled upon further complying with the provisions of the law, to purchase the said land and to receive a patent therefor.

Second. As to the tract of land next hereinafter described, the application of the plaintiff was duly made, and under and by virtue of said application the said plaintiff is entitled to an approval of his survey to the extent of said tract, that is to say, said survey should be corrected so as to exclude the land contained therein except the tract now specifically described, to-wit:

Commencing at the South west corner of a house formerly known as the Quartermaster's barn and running easterly along the (South-

ern Line) of said barn and Quartermaster's shed 272 feet; thence southerly at right angles to the north boundary of said barn and adjacent shed 1,120 feet, more or less, to the northern boundary of the railroad site as delineated on the plat thereof filed in the office of the recorder of Los Angeles county and also in the office of the Surveyor General and Controller of state; thence westerly along said northern boundary a little more than 272 feet to the intersection of said northern boundary or its prolongation with a line drawn from the South west corner of said Quartermaster's barn perpendicular to its northern wall and parallel with the line secondly above mentioned; thence Northerly along said line last aforesaid and parallel to the western boundary to the point of beginning.

Said tract being bounded on the north by said Quartermaster's barn and shed, on the east and west by parallel lines perpendicular to the northern line of said barn and adjacent shed and on the south by the northern boundary of the reservation of the Southern Pacific Railroad Company and represented on the plat aforesaid. Said reservation being more particularly mentioned in the answer of said corporation and hereinafter in this judgment.

And the said survey thus amended is entitled to be approved and the plaintiff upon the compliance with the further provisions of the law, is entitled to purchase the land included therein and above described, and to the issuance of a patent therefor.

207 Third. The Southern Pacific Railroad Company is a corporation, etc., is and at the times mentioned in the complaint was the owner of the Los Angeles and San Pedro Railroad Company, and did prior to January 29th, 1878, select the tract of land represented upon and described in the plats hereinafter referred to as a site for their depots and other buildings and for road way and located and occupied and held and ever since have occupied and held the said tract for those purposes; and on January 29th, 1878, having caused a survey of said land to be made, transmitted to the Surveyor General and to the Controller of state and to the office of the Recorder of the county of Los Angeles, correct plats of the location of the tract selected and of said railroads; and the said tracts were duly received and filed by said officials in their respective offices.

The tract thus selected was and is necessary for the use of said corporation for the purposes aforesaid, and the said corporation is entitled to hold, occupy and to use the same perpetually, or so long as they desire to do so; and the title of the defendant Banning is, and should be made, subordinate to this right.

And the court finds as conclusions of law:

That judgment should be entered according to the draft of judgment herewith filed."

SEPULVEDA, *Judge*.

208 That said judgment roll also contained the judgment or decree rendered and entered in said cause on November 28, 1879, being the same judgment and decree set forth in the answer of the defendants Banning Company, et al., herein.

Mr. WEBB: To which order of reference and judgment roll plaintiff objects on the ground that they are incompetent, irrelevant and immaterial, and not tending to prove any fact in this controversy.

The COURT: I am going to sustain the objection to this. In doing so, I will reiterate that I do not think it is in any way determinative of the issues in this case, and that is why I decline to receive it.

C. K. BOWEN, a witness called on behalf of defendants, being first duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I am engineer of the Pacific Electric Railway Company, and have been engaged as such three years. The map entitled "Map of Wilmington Harbor," showing tide lands, was prepared by me. It is a blue line print. I have attempted to show on that map the state tide land claims, and the government harbor lines, and the patent lines. The harbor lines are represented by broken line. I based what I set forth on the map, by actual surveys upon the ground, and by compilation from other surveys. The other surveys referred to were surveys that I have been personally engaged in, or have personal knowledge of. The broad green line represents the right-of-way of the Pacific Electric Railway, subsequently deeded to the Interurban Railway Company. The parallel green lines represent a strip of land sixty feet in width, over which permission to construct a trestle was granted by the Secretary of War. That is a double track pile trestle. Such trestle has since been actually constructed over that strip, and a double standard gauge line of electric railway constructed thereon by the Los Angeles Interurban Railway Company. It is used for freight and passenger and express business—a public railroad, extending from Los Angeles to San Pedro. Nothing has been built by the railroad company on the solid green strip, excepting insofar as it is included in the 60-foot right of way. The length of the trestle build on that line across there is very close to two miles. Thirty-three hundred feet of the double track electric railway, built on trestles, is included within tide land location No. 57. To the best of my knowledge and belief, the data set forth on that map is correct. The line colored yellow on the map represents the boundary line of the Inner Bay Exception, as shown on the map of the Rancho San Pedro. I made an actual survey of the railroad tracks on the ground, and tide in tide land location No. 57 to said survey, and I say that the boundaries of tide land location No. 57 are correctly set forth on that map. That map shows the present ownership of tide land location 57.

It was stipulated by counsel for the plaintiff that the map correctly represents the several claims of ownership of tide land location 57 as set forth in the several defendants answers, and that the parties named on the map succeeded to whatever interest Phineas Banning had in said tide land location. The map referred to by Mr. Bowen was introduced as Defendants' Exhibit II. A copy thereof is set forth at page 20 in the Book of Maps filed as a part of this statement.

Cross-examination.

By Mr. WEBB:

I did not make a survey of tide land location No. 57 in its entirety. I have platted it there from a description furnished me by Mr. Cumming. It is correct in accordance with such survey as I made, and in other respects corresponds with the copy of the record of the patent which Mr. Cumming furnished me.

GEORGE M. CUMMING, a witness called by defendants, being first duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I heard Mr. Bowen testify about my having furnished him with certain data from which he made the map, Exhibit 11. I
211 furnished him with copies that I personally made from certified copies from the Surveyor General's office, and also checked from notes that I took myself from the Surveyor General's office. The description of tide land location No. 57 was taken from the certified copy of the notes in the Surveyor General's office. I originally copied the notes from the Surveyor General's office, checked them from the original, and subsequently checked them with the certified copies. I checked the description with the patent, and they were correct. (It was admitted by the plaintiff that Mr. Cumming is a competent engineer.)

I merely supplied Mr. Bowen with copies for convenience. They were absolutely correct copies of the originals. I assisted Mr. Bowen in the preparation of the map, and superintended it. I had access to the original information, and I prepared the data which he put upon the paper. Tide land location 57 is also indicated on plaintiff's Exhibit A in this case. I have not compared plaintiff's Exhibit A minutely with defendants' Exhibit 11 so far as tide land location 57 is concerned, but I am satisfied it is practically the same.

C. K. BOWEN, a witness recalled on behalf of defendants.

Direct examination.

By Mr. GIBSON:

212 The defendants introduced in evidence a permit to the Los Angeles Interurban Railway Company, granted by the Secretary of War of the United States, dated the 7th day of May, 1904, by which permit said Secretary of War approved the map of location and plans of said railway company, for a railroad trestle to be built across the arm of Wilmington Bay, from Wilmington to San Pedro, California, under authority of the laws of that state, said trestle to be constructed over the strip of land delineated on defendants' Exhibit 11 (found on page 20, of book of maps filed herewith), and enclosed therein by parallel green lines, from a point in the town of Wilmington near the southerly end of E street, to a point

in the town of San Pedro on the southerly boundary line of tide land location 64, near the northerly end of Front street, subject to the conditions: (1) that whenever ordered by the Secretary of War, said company shall construct draw bridges at such points in the trestle, and of such character as he may decide to be necessary in aid of navigation; (2) the work herein specified shall be subject to the supervision and approval of the Chief of Engineers of the United States Army in such locality.

The WITNESS: The northerly portion of the trestle was constructed first, that is, the Wilmington end. The portion of said trestle extending across tide land location 57, was completed before August, 1904.

213 It was stipulated that the Los Angeles Interurban Railway Company has such title to the right of way described in the permit of the Secretary of War, as was conveyed by such permit, and that it has leased said property and whatever rights said company has derived from the Banning Company, as successor in interest of Phineas Banning, to the Pacific Electric Railway Company.

The defendants thereupon offered in evidence the trust deed executed by the Pacific Electric Railway Company to the Union Trust Company of San Francisco, dated March 2, 1902, recorded in Book 1546 of Trust Deeds, page 241, of the records of Los Angeles county, securing the ten million dollar bond issue of the Pacific Electric Railway Company, and covering all property then owned by the Pacific Electric Railway Company, and all property that might thereafter be acquired; and also offered to show that the bonds secured by said trust deed, mature in 40 years from the date of said trust deed, and that the amount of the indebtedness represented by the par value of said bonds, has been actually incurred by said Pacific Electric Railway Company, and the bonds are outstanding and unpaid.

Mr. WEBB: To which we object as incompetent, irrelevant and immaterial, and not pertinent to any issue in the case, not binding upon the plaintiff, or showing any right in the defendants, or either of them.

214 The COURT: Objection sustained.

Mr. GIBSON: We now offer a trust deed of the Los Angeles Interurban Railway Company to the Union Trust Company of San Francisco, dated July 1, 1903, recorded in Book 72 of Trust Deeds, page 137, records of Los Angeles county, which trust deed secures the bond issue of ten million dollars of the Los Angeles Interurban Railway Company, which has about 40 years to run, which said indebtedness was actually incurred, and the bonds have been issued in said amount, and are now outstanding and unpaid, and also offer to prove that said bonds mature in 40 years from the date of said trust deed, and that the said company has incurred indebtedness to the amount represented by the par value of said bonds, and the said bonds have been issued therefor, and are now outstanding and unpaid.

Mr. WEBB: To which we object on the ground it is incompetent, irrelevant and immaterial, and as far as the recitals of the trust deed

is concerned, they are self-serving, and it does not tend to show any interest in any of these defendants.

The COURT: Objection sustained:

Mr. GIBSON: You will admit for the purpose of avoiding the necessity of proof, that the bonds are outstanding in both cases?

Mr. WEBB: Oh yes, we don't question that.

215 It was stipulated by attorneys for the plaintiff that the plaintiff in this action does not question the validity of any franchise granted to the Pacific Electric Railway Company of the Los Angeles Interurban Railway Company, by the city of Wilmington, covering any of the territory in controversy in this action.

The defendants thereupon introduced in evidence, ordinance No. 54 of the city of Wilmington, granted to the defendant, Pacific Electric Railway Company, its successors and assigns, the right and privilege to construct, and for the period of 50 years to operate and maintain a steam railroad, to be single or double track in whole or in part, at the option of said grantee, over the route described as follows:

Commencing at the intersection of First street with the easterly line of D street; thence westerly along said First street to the "Wilmington and San Pedro Road"; thence along said "Wilmington and San Pedro Road" in a general southerly and westerly direction to the southerly boundary of said city of Wilmington. Said "Wilmington and San Pedro Road" being that shown upon a map attached to a deed from Sepulveda, et al., to the county of Los Angeles, said deed being recorded in Book 1180 of Deeds, records of said county, at page 7. Said ordinance was passed and adopted by the Board of Trustees of the city of Wilmington on the 5th day of September, 1907, and was approved by the president of the Board of Trustees of said city, on said date, by a two-thirds vote, and was there-
216 after published in the Wilmington Journal, in the manner prescribed by law.

Said "Wilmington and San Pedro Road" referred to in said franchise, extends from the intersection of First and West streets, Wilmington shown on Exhibit 11, thence in a general southerly and westerly direction to the westerly line of tide land location 57, shown on said Exhibit 11, crossing portions of said tide land location 57 at the points indicated on said Exhibit 11.

Defendants also introduced in evidence an ordinance of the city of Wilmington, granting to the Pacific Electric Railway Company, its successors and assigns, the right and privilege to construct, and thereafter for a period of 50 years to maintain and operate, a steam railroad, to be double track in whole, over the route in said city of Wilmington, and over and along a right of way 38 feet in width, being 20 feet on the easterly and southerly side, and 18 feet on the westerly and northerly side of the following described line, to-wit:

Beginning at a point in the southeasterly boundary line of Lot 'K' of the Rancho Los Palos Verdes, allotted to E. N. McDonald by final decree of partition of said Rancho, had in Case No. 2373 of the District Court of the state of California, county of Los Angeles,

which is distant along said southeasterly line, South $9\frac{1}{2}$ degrees East (Record Court), one hundred sixty and forty-six hundredths (160.46) feet from a 4" x 4" stake marking the southwest corner of Lot "L" of said Rancho Los Palos Verdes; thence from said point of beginning, southerly along a curve concave to the southeast and having a radius of seven hundred sixty-four and eight hundredths (764.08) feet (a line tangent to said curve at said point of beginning having a bearing of South 28 degrees 29 minutes West, true course), seven hundred twenty-eight and sixty-seven hundredths (728.67) feet to the end of said curve; thence South 26 degrees 09 minutes 30 seconds East (true course, based on United States Government Harbor Meridian), nine hundred thirty-one and forty-two hundredths (931.42) feet to Station 27 div. 34.9 of the survey of Wilmington and San Pedro Road shown upon Map No. 1024 on file in the office of the County Surveyor of said county of Los Angeles; thence continuing said course of South 26 degrees 09 minutes 30 seconds East, two hundred forty-nine (249) feet to the beginning of a curve concave to the west and having a radius of one thousand four hundred thirty-two and forty-seven hundredths (1432.47) feet; thence southerly and westerly along said curve, two thousand one hundred seventy-five (2175.00) feet to the end of said curve; thence South 60 degrees 50 minutes 30 seconds West, eight hundred twelve and thirty-three hundredths (812.33) feet to the beginning of a curve concave to the north and having a radius of seven hundred sixty-four and eight hundredths (764.08) feet; thence westerly along said curve, six hundred twenty-three and seventy-seven hundredths (623.77) feet to the end of said curve; thence North 72 degrees 22 minutes 30 seconds West, one hundred thirty-three and seventy-three hundredths (133.73) feet to the beginning of a curve concave to the south and having a radius of seven hundred sixty-four and eight hundredths (764.08) feet; thence westerly along said curve, five hundred twenty-five and thirty-three hundredths (525.33) feet to the end of said curve; thence South 68 degrees 13 minutes 30 seconds West, six hundred seventy-six and fifty-eight hundredths (676.58) feet to the beginning of a curve concave to the southeast and having a radius of seven hundred sixty-four and eight hundredths (764.08) feet; thence southwesterly along said curve, two hundred sixty-five and forty-six hundredths (265.46) feet to a point in that certain boundary line of said lot "K" having a record course of North $70\frac{1}{4}$ degrees East, which is distant easterly along said boundary line, three hundred sixty-eight and thirty-five hundredths (368.35) feet from a 4" x 4" post marking the westerly end of said last mentioned course.

Said ordinance was duly passed and adopted by the Board of Trustees of the city of Wilmington, and approved by the president of said Board on the 6th day of July, 1909, by a two-thirds vote, and was thereafter published in the Wilmington Journal in the manner prescribed by law.

Said ordinance No. 97 includes in part the route described in said ordinance No. 54, and traverses and crosses portions of said tide land location No. 57.

It was stipulated on behalf of the plaintiff, that all taxes, state, county and municipal, which have been levied or assessed against the respective parcels of land in controversy in this suit, have been paid by the defendants or their predecessors in interest, and that taxes have been so levied, assessed and paid each year for more than ten years, prior to the commencement of this suit.

Defendants offered the field notes on file in the office of the Surveyor General of the survey made by Frank Le Couvrer, County Surveyor of Los Angeles county, for Henry B. Tichenor, made April 23, 1870, upon the application of said Tichenor for the purchase of the lands in controversy in this suit, under the provision of the statutes then in force for the sale of swamp and overflowed and tidelands, containing the certificate and affidavit of Frank Le Couvrer as County Surveyor of Los Angeles county, to the effect that all the land embraced in said application to purchase including all the land in controversy in this suit, is above the line of low tide. It was admitted by counsel for plaintiff that said Frank Le Couvrer is dead.

Mr. WEBB: We object to it as incompetent, irrelevant and immaterial, not pertinent in this case.

The COURT: Objection sustained.

The defendants thereupon introduced an ordinance No. 98, adopted by the Board of Trustees of the City of Wilmington, July 6, 1910, which ordinance extended the time for the completion of the railroad granted by the terms of ordinance No. 54 hereinbefore set forth, which ordinance extended the time for such completion to the 1st day of May, 1910.

It was admitted on behalf of the plaintiffs that the plaintiffs, or the state of California, have not received any rents, issues or profits from the lands in controversy in this suit.

J. A. BELL, a witness called on behalf of defendants, being first duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I am assistant engineer for the Pacific Electric Railway Company and the Los Angeles Interurban Railway Company, and have been such since March, 1904. I have been engaged in engineering in connection with railroad work for 21 years. I have been personally engaged in the construction of railroad tracks, bridges, trestles, etc., in connection with railroads. I had charge of all the work, building the trestles and tracks over the inner bay at San Pedro. Those tracks are operated by the Pacific Electric Railway Company, and are indicated on the map, Exhibit 11, by this strip marked in green. Nearly the entire distance is occupied by double track pile trestle—wooden pile trestle. The total distance of trestle is 9360 feet. The distance between the track centers is 15 feet 6 inches. The extreme width of the trestle is about 28 feet. Sixty pound American Society Section, sixty pounds to the yard rails are used in that track. The overhead work for the purpose

of supplying electric power consists of the center pole construction as we call it, with arms projecting upon each side, carrying the trolley wire. Beside that, high tension wires and telephone wires, and the feeder cable which carries the main current for feeding. The standard cars of the Pacific Electric Railway Company are operated over that road. The passenger cars are approximately 50 feet long and weigh about 34 tons without their load. They are equipped with four 76 horse power motors, approximately three hundred horse power, and they operate them in trains as high as five in a train. The seating capacity is 56 passengers per car, and under the present schedule, from 30 to 35 trains operate each way daily, besides 222 freight trains that run over it. The motive power is electricity, and the line extends from the city of Los Angeles to San Pedro. There is a street railway system in San Pedro, standard gauge, with which the Pacific Electric Railway connects. We run a steam locomotive over the track for construction purposes, but not as a regular train. The track and trestle is strong enough to carry a locomotive. That portion of the track on the trestle, across the bay and across tide land location 57, is absolutely necessary for the operation of the road and cars between Los Angeles and San Pedro. The road was constructed between June, 1904, and June, 1905. It was finished and the first train went through to San Pedro on July 4, 1905, if I remember right. The road has been operated continuously since, and it carries freight and passengers, and I think it does an interstate business although that is out of my line. The approximate cost of the trestle and road as constructed the entire distance across the bay, was \$175,000, including the reinforcement of the piles, made between 1906 and 1908. The amount of the reinforcement was \$11,000. The reinforcement was required because of the attacks of the tredo and liminora. There is about 3080 feet of this trestle on tide land location 57, and the cost of this trestle over tide land location No. 57 is about one-third of the total cost of the trestle, or say, approximately, \$55,000.

223 The Pacific Electric Railway Company has done work in constructing the railroad on the route of the franchise granted around the bay, or west basin.

Mr. ANDERSON: We are not questioning that franchise from the city of Wilmington around the bay, nor any franchise that either the Pacific Electric Railway Company or the Los Angeles Interurban Railway Company has around the bay.

J. A. BELL, called as a witness on behalf of the defendant, being duly sworn, testified substantially as follows:

I know personally about the construction of the railroad now in progress around the west side of the inner basin of Wilmington Harbor. I have charge of the work. The railroad is being constructed under franchises granted to the Pacific Electric Railway Company by the city of Wilmington and about 250,000 yards have been excavated and we have about 2800 feet of track laid out of approximately two miles of double track which will ultimately be laid there. We are constructing the road for freight and passengers—

for general purposes. The cars can be propelled by steam or any other motive power. We have a large force of men at work there. The work is being done largely by steam shovels. The work is going on continuously. The work was commenced in

224 August of this year. Approximately we have spent twenty-five or thirty thousand dollars up there, up to the present time. That is, on what we call the franchise of the San Pedro and Wilmington road, around the bay. Our appropriation for that purpose covers also what we call First street, Wilmington. The franchise and railroad referred to cross tide land location # 57 at certain points. (Witness indicated on map defendants' exhibit 11.)

WILLIAM MILLEN, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. GIBSON:

I am a wharf and bridge builder. Have been employed by the Southern Pacific Railway Company in that capacity for 35 years. I was employed in and about Wilmington and San Pedro. I was employed in Wilmington in 1860. I lived in Wilmington from 1860 until 1894. I was off and on the road all the time, running backwards and forwards on the railroad. I worked on the railroad wharf in 1860. That was the Banning wharf at the end of Canal street. It was constructed before I went there in 1860. That is the wharf that shipping was done over,—that is the wharf that extended into the main Wilmington channel. I remember Major
225 Jones and the wharf that he constructed. The Jones wharf must have been constructed somewhere in the neighborhood of the 70's—of the early 70's. It was built by Jones and Wilson. I think Wilson was the main party. Wilson was the owner, and Jones was the workman. Wilson's name was B. D. Wilson, and he was the owner of the wharf. It was located about two blocks west of Canal street. The wharf was connected with the old government warehouse, the old commissary department, by a causeway, or embankment, which was built up between the warehouse and within about 100 feet of the main channel, and on the end of that causeway was built the piled wharf. The wharf was built along in 1870 something. The government warehouse was constructed in 1864. The government got supplies to the warehouse through the Banning wharf at the foot of Canal street. Subsequently this other canal was excavated, connecting directly with the warehouse. The dirt out of the canal was used to make the causeway or mud wharf leading from Wilson's wharf to the warehouse. There were some sheds or wings added to the warehouse, and they extended toward Canal street. They formed a corral. The canal which was constructed by Jones for Wilson, connected the warehouse as it now stands, with the channel at the water end—the Banning end—the west end. That is, the end of the warehouse nearest to the bay. The causeway was constructed of mud or earth as far as the line of railway
226 runs now, and from that on to the main channel it was piling. I recollect that well. This cause way had a little railroad

tramway—a narrow gauge tramway—on it. The cars were pulled by horse power. There was quite a little piece of piled wharf toward the channel. The tramway ran to the end of the wharf. The old warehouse was afterward used by the Southern California Cooperative Warehouse Association. That wharf was only used for a short length of time. It naturally went to pieces. The bulkhead rotted out, and everything went to pieces. There might be some stumps of piles left in the mud. That is all that remains.

Boschke dredged the channel or canal. It was about the width of his dredger, or a little more,—say about 60 feet. It was dredged with a lever dredger, with a scoop on the end. They didn't dig down very far on account of the hardpan. They merely skimmed the mud off the top, and when he got into the hard material he quit. That channel could not be used at all stages of the tide. Small boats could use it at high tide when the water came in. The channel that was dug by Boschke might permit a very light vessel to get in there at high tide. I never saw one there. They used to lie out at the end of the wharf,—lie at the end. I don't think the channel was used at all after it was built. They always used the end of the wharf at the main channel.

227 I remember dredging that end between the Wilson wharf and the foot of Canal street. Captain Hackett did some dredging for Phineas Banning. He dredged a piece there in December, 1880. He dredged somewhere in the neighborhood of one hundred and ninety odd thousand yards.

I remember the ways in the inner basin. They were constructed in 1867. No, in 1870. They were in use about five years. They were located about a quarter of a mile west of Canal street—about two-thirds of the distance in the quarter of a mile—about two or three blocks. I lived in Wilmington at the time the little canal was constructed by Jones at the government warehouse, and I remained there until 1894. I lived there 34 years. The canal constructed by Jones was never deepened after Boschke left it. It had filled up considerably before I left in 1894. I could tell by the way the water would come in there, the tides. At low tide the bottom was exposed to view. I haven't seen it for ten or twelve years. The last time I saw it the bottom was exposed to view at low tide. At high tide it was covered. That canal was never used for transportation purposes so far as I know. The bulkheads of the causeway rotted, and then the water just washed it away—the storm waters and water in the bay.

Q. Now, you say that there was very little water, if any, in 228 the channel alongside where the wharf used to be, at low tide.

I now ask you, when the tide is out, whether the inner basin is covered or not, or what portion of it is covered by the tides?

A. The flats, you mean?

Q. Yes.

A. They all run dry at the lowest tide. Everything went dry except the channels. There was four channels run on the west, that one side.

Q. Are those the deep channels? Are they deep?

A. No; they run shallow. The farther any of them go on the flat the shallower they get. They are dry, clean up at the upper end. I think the flats are higher now than they were in 1866. I last saw the flats about 15 years ago. Those flats are composed of black mud. I have seen two winter floods come down that way. The floods covered over the flat between what we called the slaughter house—over to Long Beach. They came all the way down the Los Angeles river and the old San Gabriel river was all flooded—all that flat was flooded. I think the big flood was in 1861 or 1862. The next flood I saw was in 1868, but that was not as extensive as the first one. I don't remember any other floods. There wasn't any government building in Wilmington when I went there. The old quartermaster's building hadn't yet been built. Phineas Banning and Tichenor are the men who used to use the ways for boats that
 229 I referred to. They used to be called Tichenor's railway—marine railway.

Cross-examination.

By Mr. ANDERSON:

I have not been near those old marine ways for 15 years. I am not familiar with the streets of Wilmington. There wasn't any laid out streets when I was there—only Canal street. The marine ways were about two or three blocks west of the government warehouse. I was living in Wilmington in the early 70's, and left there in 1894. There were marine ways or docks east of Canal street in those early days. They were located about a couple blocks east of Canal street. They were just little slide ways. They used a crab to haul the boats out with, what we called a crab. That was for the purpose of cleaning the bottoms and repairing them. Phineas Banning owned them. They were built somewhere in 1859—just a year or so before I came down there. That didn't extend out to the channel at that point.

Redirect examination.

By Mr. GIBSON:

The ways that were located about two blocks east of Canal street were used for scows, lighters and flat bottom boats having a very light draft. That remained there 7 or 8 years, and then the marine ways were put over west of that afterwards, west of the government
 230 warehouse. Those east of Canal street were not used after those west of the government warehouse were constructed. The new ways were used for the same purpose as the old ones.

That photograph marked Exhibit L is something similar to the time I lived in Wilmington. I don't see hardly any alteration—no more than that building you see there, used to stand on the opposite side.

Mr. ANDERSON (indicating figure 3): This is Canal street. That runs out to the wharf, and that building stood there. I am referring to the building shown on the exhibit, right to the right of Canal street. That building has been moved across Canal street, over on that side. The canal shown in the photograph just to the right of

Canal street, is the canal that was constructed by Phineas Banning before I went to live in Wilmington. He used to run his barges up the canal—up about where the line of the railroad is now, and he had his warehouse there.

Q. Now, where would those barges ride outside of the canal at high tide—outside of the canal, where would they be able to go at high tide?

A. They could go right down here in the channel, and then down to the harbor—outer harbor. They would be able to ride on the water to other places on the bay along in the main channel. Not outside of the main channel without very extremely high
231 water. They were liable to get on the flat. Those barges that Mr. Banning used, were used for lighters. We would not be able to ride around the bay with them over the flats. You could in extreme high water which occurred along about twice a year, but not at the ordinary high tide. Not without they were light.

The old ways were located right where you see the tules, Exhibit L. There was no artificial channel constructed up to those slide ways—that was all flat—all the way through there. The channel ran farther out. The water was shallow—was not quite so deep as the channel, farther down—down the harbor—down toward Timms Point. Those lighters General Banning used were run into the artificial channel constructed along Canal street. They were small lighters, and they came up in here. When he wanted to clean them, he ran around and brought them on this railroad. Of course they were without load, and carried a very light draft, about 18 inches of water when not loaded.

Q. Now, do you see a channel indicated on this map, constructed up towards the warehouse, over towards the right there? You can see the warehouse there; that is, the old government warehouse, you may assume that is marked 16.

A. They would come up what we called the railway channel, and go right up in there before that railroad was put across. The canal leading up towards the warehouse had a road built
232 alongside of it, with mud from the canal. That canal was not built with the expectation of using it to run lighters in there. They were going to run the steamer Newport in there, but she never got in there. The canal was projected at the same time the tramway was thought of—part of the original plan. They dredged this canal out, and made the tramway out of the dirt. The tramway went down to the wharf, and down to the flats, and then they extended a little wharf on the end.

There was no fishing on the inner bay, during the time I lived down there. The fishermen always did their fishing outside, with a hook and line mostly, when I first came down there. Some times they would fish inside, but there wasn't much fishing on the inside because there was nothing in there hardly but stingaree in my days. I often went out and got a good mess of razor clams on the mud flats. I have seen them draw their nets and seines for bait down at Boschke's Island or on the Terminal Island side. I never noticed them drawing any seines over the flats.

WILLIAM MULLER, a witness called on behalf of defendants, and being duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I live in San Pedro. I am a ship builder. Have been
233 engaged in that business for 28 years, both in Europe and
this country. I have been engaged in ship building in and
about the harbor of San Pedro and Wilmington since the 9th of
August, 1898. Principally at Mormon Island, and other work
around the bay. I remember when the dredger Olympic was
burned. The fire started alongside of the inner harbor wharf. The
dredger was burned and put ashore in the middle—in San Pedro
Bay—opposite Morman Island. The fire started at five o'clock in
the evening. It was about 6 or 7 years ago. I don't remember the
date, or the month. After the dredger was burned and sunk opposite
Mormon Island, she was left there for a while. Then she was re-
moved for salvage over to Mormon Island, or to the ship yard.
She laid there from that time until just about 6 or 8 weeks ago, when
she was removed by being crushed up with dynamite—blown up in
sections with dynamite and removed. There are portions of the
dredger situated now in the west basin, on the west side of the rail-
way trestle, along the shore. They floated in there. They floated
over there from the yard towards the railroad trestle. That was
about two months ago I should say. I examined those portions of
the barge on shore in the inner basin, and identify them as being
part of that barge. I made that examination last Saturday. I
didn't find any other portions of wrecks or of barges in there, except
some old skiffs that were not afloat—they were ashore—por-
234 tions of skiffs. By a skiff I mean a light row boat—about 16
feet long, 16 or 18 feet long. Some of them might have
been in use. They were tied up there, and lying there. The point I
am talking about where I found them, is just west of where the
shipyard used to be—between the Pacific Electric Railway tracks
and Los Barillos. I found indications of old ways used there for
pulling up boats. I found an excavation or depression 50 feet wide.
It was a little ways west of the old government warehouse. It was
just a depression, not a channel. A depression in the high land.
A slight slope towards the water, but it was above high water mark.
On the beach nothing could be told except two stumps stuck up.
Those stumps were about 6 inches square. They were irregular
and eaten up by the worms. I found a block, what we usually call
a block, twelve by twelve, three feet six inches long, lying in the
mud. I did not find anything to show that large ways had existed
there. I was not there until 1898.

The Olympic was brought up on Mormon Island, on the west side
of Mormon Island, alongside the main channel, just southeasterly of
the shipyard. We took out the machinery and left the hull there.
It was not far from the marine ways on the island—about 200 or
250 feet south.

235 Cross-examination.

By Mr. WEBB:

I know where Canal street, Wilmington, is. I don't know where F street is. These marine ways lie just west of the Pacific Electric Railway—that is—the old ways. I didn't notice heavy timbers extending an indefinite distance between the water and along the shore. I seen the bolts sticking out. I dug out the timber—I dug it out. It was twelve by twelve, three feet six or eight inches long. I let it where it is.

EDWARD T. WRIGHT, a witness called on behalf of the defendants, having been first duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I am a civil engineer and surveyor by profession and have been so engaged for 36 or 37 years.

Mr. WEBB: We admit Mr. Wright's qualification.

I have been county surveyor of Los Angeles county in 1881, '82 and a portion of '83; also '85, '86; also 1895, '93, '97 and '98. I made a search in the office of the County Surveyor for the fee book relative to the fees paid by Phineas Banning to George Hanson for the survey made of tide land location #57, the survey having been made in February, 1866. I do not find any fee book nor any
236 record of any payment on such survey. I made a similar search with reference to the survey made by Mr. Ellis and found nothing. It was not customary to keep a fee book during my incumbency for making tide land surveys. I kept no fee book nor record. I did not find anything in the surveyor's office in the way of a fee book when I occupied that office. I have examined the field notes of the surveys of tide land location #57 that I have referred to in order to make a computation as to the cost of such survey under a fee bill or statute of 1861.

Mr. GIBSON: The defendants offer to prove by the witness Wright that in his judgment Phineas Banning would have paid to the County Surveyor at least \$241 for the survey made by Mr. Hanson while he was county surveyor, of tide land location #57, in 1866.

Mr. WEBB: We object on the ground that it is irrelevant, incompetent and immaterial, also calling for an opinion of the witness and a calculation.

Mr. ANDERSON: We do not intend for plaintiffs in this case to controvert any presumption that may arise as to the payment of fees.

The COURT: The presumption, Judge Gibson, it seems to me, would be that he paid whatever the legal fees were, whether they were large or small; whatever was reasonable was paid. Now, this

witness might state \$241, and another witness might state
237 \$75, and it would not make any difference to the court
whether it was \$241 or \$75 or any other amount. The ob-
jection will be sustained.

Mr. GIBSON: The defendants now make the same offer with re-
spect to the survey made by County Surveyor T. J. Ellis in relation
to the same tide land location #69—the second survey.

Mr. WEBB: We object to that on the same ground.

The COURT: Objection sustained.

Mrs. MERCY POWERS, a witness called on behalf of defendants, and
being first duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I live at San Pedro—down near the lumber yard, and have lived
there since 1895 with my family. Our dwelling house is situated
east of the Southern Pacific railroad, perhaps a couple of hundred
feet. It can easily be seen from the railroad. The land on which
that house stood was filled in ten years ago, or more. The soil came
from the bay, in front. They were dredging out the bay, that is
where the salt water flows. The land was filled in to a depth of five
or six feet, around the space outside of where the house actually
stands, and under the house, and where my garden is situated.

238 We grow vegetables on that soil, of various kinds, tomatoes,
cucumbers, onions, different kinds of garden truck, also
flowers, roses, carnations, different kinds. They grow very well there.
Pepper trees also grow there. There is a very large one there. We
also have shrubs growing there, and vines—trumpet vines.

The COURT: That is enough on that.

The WITNESS: It was a couple of years or more after the soil was
pumped in there, that we began to plant in the garden. I didn't
try to put in a garden when they first started the lumber yard. I
had to wait first to see how much I could have for a garden. We
planted flowers and shrubs first, and they kept growing from the
time we commenced to plant. We have alfalfa growing on that land
now. It grows very well. It has been growing some years.

CHARLES W. POWERS, a witness on behalf of defendants, being
duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I have lived at San Pedro, at the lumber yard, since 1895, with
my wife, who was just on the stand. I am employed by the lumber
company. I have lived in San Pedro since 1886 or 1887. The land
which was pumped out of the bay, and on to the land where
239 I live, is identical in character with the land on the flats, and
other places in the bay, sand and shell soil—some clay ma-

terial mixed with it. Everything grows on it just as my wife stated. We have been growing materials there for probably the last seven years. Before this filled material was put on, the land where our garden and house are seemed to be a sandy soil—somewhat similar to what was put on. I think the atmosphere probably had bleached it to some extent. It was a little browner, if anything, to the present soil that was pumped on.

Cross-examination.

By Mr. ANDERSON:

That land was above high tide on Smith's Island, or Boschke's Island. It was above high tide before this filling was done. I could not say how much above. The water never came up over it I know.

LOUIS WILHELM, a witness called on behalf of defendants, and duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I live at Hyde Park, about a half a mile from the city limits. I am a farmer, and was born and raised on the farm, and am still farming. I farmed at the sea coast near Playa del Rey. I am still farming there. I have farmed on filled land some. I have seen the land down at Wilmington that has been filled in. I
240 saw it last Monday, a week ago yesterday. I saw it filled where the dredgers were at work. That land is identically the same with the land that I farmed that was filled in near the sea coast.

Q. What can you grow on such land, or what have you seen growing, of your own observation?

Mr. ANDERSON: We object to that as incompetent, irrelevant and immaterial, as to what was done at Playa del Rey.

The COURT: Objection sustained.

Mr. GIBSON: We propose to follow that up by showing that the witness has raised various vegetable products on land filled in from the salt water, that is substantially the same in character as the land filled in on these tide land claims in litigation, in several of these cases, and that the land throughout the whole flat—we think we have already shown—is of a similar character to that testified to by Mr. and Mrs. Powers; and we offer to prove that this witness has farmed land substantially the same where it has been raised above the level of high tide, and raised various vegetable products thereon, such as are raised on farms, and that the land filled in on the various tide land claims, so far as filled in, is the same substantially in character, and will, if farmed, raise and produce the same products.

Mr. WEBB: We object to the offered testimony as incompetent, irrelevant and immaterial.

The COURT: Objection sustained.

241 The WITNESS: I was on what they call Mormon Island where the dredgers were working. I saw the land adjacent to Mormon Island, farther up—the original tract there filled in. I saw the land right north of the Banning machine shop, where we got off the car. The filling that I saw was out in the harbor, on the Mormon Island peninsula.

The COURT: You would like to show that the soil that has been pumped out of the bottom of this bay, and put on the land which is above high tide, will grow vegetables?

Mr. GIBSON: Yes sir.

Mr. ANDERSON: There is no doubt but that soil which has been bleached out will grow vegetables.

The WITNESS: The filled in land that I saw at Mormon Island and the adjacent filled in land will grow vegetables. It will grow vegetables the next year after it is filled in. It will grow alfalfa, barley, onions, beans, lima beans, as soon as it has a good rain on it—is properly cultivated. It has sour clover on it now, about two feet high. Wherever sour clover grows, most anything will grow.

FRANK L. BOWEN, recalled on behalf of defendants, testified as follows:

Direct examination.

By Mr. GIBSON:

242 I live at Sawtelle. I have lived in Venice, and have seen land cultivated there that was pumped out of the salt water lagoon. I saw land that was pumped out with dredgers at Mormon Island, and the land adjacent to Mormon Island on the north. It is identically the same, in my opinion, as the land that was pumped out of the salt water lagoon at Venice. It would require about a year's time, or a winter's rain upon it, after this soil is pumped out, and raised above the high tide line, before one could plant vegetable matter there. Then it would be ready to raise crops of certain kinds. I heard the testimony of Mr. Wilhelm as to the kinds of vegetables and crops that can be raised on that land, and I would say the same thing.

Cross-examination.

By Mr. WEBB:

Before this land would be profitable for cultivation, it would be necessary to raise it in the neighborhood of three or four feet above high tide—possibly two and a half feet.

By the COURT: I suppose high enough so that the salt water would not get to the roots of the vegetables.

A. Yes sir.

Redirect examination.

By Mr. GIBSON:

I saw excavations made at Venice near the canal where it was filled in. I saw water underneath, and crops growing on top—
243 flowers and trees. I was born a farmer, and have been a practical farmer all my life until the last few years.

F. W. LLOYD, a witness called on behalf of defendants, and duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I live at San Pedro, and have lived there since the 16th of June. I am familiar with the ground that has been filled in at East San Pedro, or Terminal Island—the southern part of the government jetty known as the east jetty of Wilmington.

I have lived at San Pedro since 1903. My business is electrical and mechanical engineer. I have also had experience as a farmer. I have seen various products grown on the soil that was pumped in from the bay on the Terminal side. The soil that was pumped in there is precisely the same as the soil on the territory lying immediately north of and adjoining Mormon Island, and the tide flats in general throughout the bay. I have seen the material that is pumped in on tide land location 152, adjoining Mormon Island on the north. The soil that was pumped on the Terminal Island side was taken out of the channel near the turning basin—part from the turning basin—part from the channel just beyond. The
244 soil was filled on the Terminal Island soil to a depth of, I should judge, approximately about 4 feet. It was deposited by suction dredger. That is the soil upon which I have seen vegetation growing. I think they started to pump that soil in there about two and a half years ago. I have observed growing there cucumbers, tomatoes, beans. They were growing there this summer. I have also seen other products growing there, grapes, eucalyptus, bamboo, palms, several varieties of flowers, also potatoes. I have specimens here with me that I have seen growing there, which I have collected myself.

The first of these specimens is a rose. It is a tea rose. That was taken from the fill east of the government jetty, from a rose bush growing right on the ground, on this soil that was pumped in there. Another of these specimens is a calla lily. The rose bush was from three to four feet high. The calla lily between two and three feet. That is a flowering plant.

The next specimen is part of what is commonly known as a cigarette tree, or Indian tobacco tree. The tree from which I took this was about ten feet high.

The next specimen was a sprig of mint, which was about two feet or two and a half feet high. The next is a piece of eucalyptus which came from a tree between nine and ten feet high. That eucalyptus

245 was put in there about the 16th of June this year—just a small plant about 18 inches high. The next specimen is a cucumber, which grew from a vine on that ground, right by my house, about five feet from the porch.

The COURT: You haven't got any lemons?

A. No sir.

This specimen is a part I took off a tomato vine which was about seven feet or eight feet high. Green tomatoes—that ripen there. They were used all summer. It is now a little late in the season for some kinds of vegetation.

I also have here some sweet peas. That is a vine that was growing right out there on that filled in soil. This other specimen is cut off of a grape vine growing in front of one of the houses there—four or five of them were planted about June. Those grape vines I should think were about 18 inches high. Here also is a leaf off of a castor bean tree. That I should judge is about 15 feet high. It covers a large area. None of these things are cultivated at all. They are growing in a natural state. They are planted there, but not cultivated.

Here is another specimen—a geranium—several varieties of these growing there—large and thrifty. This specimen is cut off of the top.

The bamboo I spoke of growing there is about 15 feet high. The palm trees are about three or four feet high. All these plants are rooted in this soil, and are growing there in the natural soil, just as it was pumped up. It was pumped up two or two and a half
246 years ago. There was no top soil of any kind put on that at all. That soil consists, generally speaking, of sand, shells, broken shells, and dirt, just as it comes up from the bottom of the bay, a sort of a mud when it first comes up. The soil which was filled in there, upon which this vegetation is growing, is, approximately, about four feet above the high tide line.

I have seen land under cultivation in the Philippine Islands, from which salt water had been excluded by earthen dikes. The level of that land was such that, as it would appear to me, if it were not for the dikes that were thrown up, the land would have been submerged under the water. Those were what are called rice paddies. The soil there was very similar to the eye, to the soil on Terminal Island that I have been testifying to, with the exception, I think, there was a little more dirt than appears to be here—not quite so much sand on the Philippine soil—kind of a clay substance, more than appears to be on Terminal Island. I said that rice was growing there. I saw it harvested. I had nothing to do with the preparation of those rice fields, but I saw the fields, and saw the dikes around them. I don't know when the fields were prepared after diking. I was there during the time the rice was sown and harvested, and the soil received no treatment during that time.

247 At this location where the vegetation grew on Terminal Island that I have spoke of, there was no land there before the mud was pumped on to it. It was all salt water. The salt water was pretty deep there before that was pumped in, because

even at the lowest low tide there was never any sign of mud there. It is down on what is known as the east jetty. I should judge there are about 180 acres of this filling there, in the aggregate—at present. It lies east of the east jetty. This vegetation that I have shown samples of was taken off near the California Fish Company's wharf. This is about opposite between Seventh and Eighth streets of San Pedro.

Cross-examination.

By Mr. ANDERSON:

Where the vegetation was taken off, I should judge this land was about three and a half or four feet above high tide. The Salt Lake Railroad trestle is very much higher than this fill is. The fill is even with the east jetty that the government put in there, and in some places it is even much lower.

ANDREW YOUNG, a witness called on behalf of the defendants, having been first duly sworn, testified substantially as follows:

I have lived in and around Wilmington since 1880. I am familiar with the water wells located down on Canal st. near the place called the machine shop. That shop was known as the Wilmington Transportation Company's shop. That well supplied water to San Pedro and Wilmington. Those wells were originally sunk to 18 feet; one of them was lowered to about 20, and one well to 22 feet. Those wells were located within a few yards of the high tide line. The first well was sunk in 1881 and was used to 1903 by the company for the purpose of supplying water to the towns of Wilmington and San Pedro and to supply water to the shipping at San Pedro. There was no other water supply in that neighborhood for shipping purposes or other purposes at that time. I know that there was a well sunk near the road that goes around the west basin. That well was sunk in 1887. It was sunk to a depth of 630 feet. That well has a lot of grass and vegetation growing around it. There is a small supply of artesian water around there. The water flows off of the surface. It is flowing now and has been flowing since 1887. The last well I referred to is located (indicating on Exhibit 11) on tide land location #154 near the point where the electric railroad crosses the Wilmington and San Pedro wagon road. Sepulveda has a well just north and west of the well I speak of. Sepulveda's well is only about 15 or 20 feet deep. It supplies him with water and he is supplying some parts of San Pedro with that well. Sepulveda is a farmer and his well is 20 feet in diameter and is 18 or 20 feet deep. He pumps the water out of it with a steam pump. The well supplies somewhere between twenty and twenty-five thousand gallons in twenty-four hours. I know where the Los Barillos spring is. It is known as the barrel spring. It is in the west end of the west basin, at what would be the northwest corner of the townsite of New San Pedro. It is located on tide land location #57 and the tide flowed into it at high tide. The barrel is not there now but the spring is there. The

or y use I ever saw it put to was in the eighties or '81, when Capt. Hackett was dredging. I took water from that spring. It was drinkable, usable water.

GEORGE DART, a witness called on behalf of the defendant, having been duly sworn, testified substantially as follows:

Direct examination.

By MR. GIBSON:

I am seventy years of age. I reside in Maricopa. My native land is Nova Scotia. I have been in and around San Pedro. I was there some few years ago and have been there lately some. I have had some personal experience and observation of the cultivation of lands from which the salt water has been excluded by dikes, in Nova Scotia, near the Bay of Fundy at St. John's, New Brunswick, hardly that far down. It was up to the very head of it—to tide
250 water. This experience was with respect to farming salt lands and salt marsh lands. In the olden times they built just square dikes, but at the present time, with in the last twenty-five or thirty years, they built what we call rolling dikes; that is, they built them with scoops and horses and fetched the mud up on them. In the olden French times I have seen the dikes built by hand, by spades—I have seen those dikes built. I have seen the land put under cultivation after they were built. They raised hay. They called it timothy hay and clover. I have seen grain, oats, potatoes, vegetables grow on those lands. If the dikes were not there the salt water would come over those lands and it would be no good at all. Those dikes are all the way from 18 to 22 feet high. Up at the head of the bay there is a very heavy tide in the Bay of Fundy, and at the head of the bay it is not so high, the tide does not raise so high up there. The high tide would come up against the dikes and the water would not go through the dikes. The mud down in Nova Scotia is very sticky and clammy, and it is a red substance. I notice this in Wilmington is a kind of brown substance, black and gray, and it is about the same thing, you know, it is sticky like the Nova Scotia mud.

Q. If that land down in Wilmington Bay that you say is dark and sticky were diked off, if there were dikes placed along so as to keep
out the tide, would that soil there raise vegetables and hay.

251 —. Well, as far as my judgment goes, I don't see why it would not. If the land here gets any fresh water at all, what experience I have had, and what I have seen of it, it will grow anything.

Cross-examination.

By MR. ANDERSON:

Q. Did I understand you to say that the water at high tide would stand against the dike for an hour at flood time?

A. Well, it will stand—it is very moderate. It don't ebb or flow, not very much, you see. They stand, I will say, an hour before you

can tell much about it going either way. They run very swift when they do run in the Bay of Fundy, but it stands, you know. We would generally go out swimming, and it is very deep down there, and there would be no great current,—you could stem it anyway. The elevation of the tide at our greatest marsh, is about 62 feet of a rise, at high tide. Of course, where I lived, up at the head of the bay of Fundy, it don't rise that much—35 or 40 feet in one of the channels and there is a great deal of marsh there.

Redirect examination.

By Mr. GIBSON:

Q. These lands that have been reclaimed in Nova Scotia for agricultural purposes, how do they compare with farming lands upon the dike, or the uplands in value?

252 Mr. ANDERSON: We object on the ground that it is incompetent, irrelevant and immaterial.

The COURT: Objection sustained.

Recross-examination.

By Mr. ANDERSON:

Q. Do you say land was brought up from the upland for building these dikes?

A. No sir, they would take it right up out of the flat, where they build the dikes. They put it in a certain distance and build the dikes, so that the tide won't wear away this stuff, and if it happens to go out they put in water breaks—that is, brush and stone, which shoots the tide off. We reclaim a great deal of marsh that way in our country with water breaks. These reclaimed lands are located on the Bay of Fundy. At the Bay of Fundy, you understand me, there is a river runs up here called the Shubenacadie river, and there is another called the Truro Bay, but still that is washed, that is called marsh land on the rivers, but still it is just as high as the tide is there down by the Grand Pre marsh. But away up at the head of the rivers, I am not speaking about that. I am speaking about these marshes down here where there is thousands of acres of it at the mouths of the two rivers. The bay is six miles wide where I lived. But what we called Truro Bay is about four miles before it strikes the marsh banks on each side. The dikes grow grasses. They

253 mow right over the dikes. On the outside of the dikes they grow what is called marsh hay because the tide runs in there. They cut it, makes fine feed. On the inside of the dikes we raise the best timothy hay and clover we have in Nova Scotia. The upland is not very productive—unless they draw the mud up there and spread it over the upland and fertilize it. If the mud is placed on the upland it grows good grass. We use that mud and also bone meal and one stuff or another. The mud is composed of a sticky soil. I have seen horses stuck right outside of the dikes, and go down, and you had to get planks and bring them up.

JOSEPH A. WELDT, a witness on behalf of defendant, being duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I live at Wilmington. Have resided there nearly forty-two years. I am now vice-president of the Bank of San Pedro, and deputy city tax collector of the city of Los Angeles. I am familiar with the inner bay of San Pedro, some times called Wilmington Bay. I know of fresh water springs in that bay. There are in the western basin quite a number of them, south of where there used to be an old well or springs where they used to get water from to furnish ships in the early days, that is, in the eighties. That old spring is called

Los Barillos. There are springs south of that, out in the 254 mud flats. These springs would be covered at high tide. I have tasted the water and know that it is fresh. There are

wells very close to the tide line. Years ago there was a spring called Schweitzer spring on Terminal Island, or as it was called, Rattle Snake Island at that time,—twenty or thirty years ago, I remember seeing it. I remember seeing goats there. I lived there at the time, and used water from this spring. That spring was southerly from Mormon Island, across on Rattle Snake Island, what is Terminal Island now.

I know of a well located in the vicinity of Miles street, Wilmington, at the edge of the water. That was called Lopez well. That was right among the tules. That was a fresh water well. You can see the remnants of it today. The hole is there. The tide came up almost to it.

C. G. KEYES, a witness on behalf of defendants, being duly sworn, testified substantially as follows:

Direct examination.

By Mr. GIBSON:

I have lived in Los Angeles county since November, 1868. From 1868 to about 1880 or 1881, I resided in Wilmington. Afterwards, up to 1887, in San Pedro, and from then on in the city of Los Angeles. My remembrance is that I left San Pedro in February, 1887.

I am at present, and from 1902 or 1903 have been, county 255 clerk of Los Angeles county. Prior to that I was deputy clerk from 1887.

I remember when the Act of 1872, in relation to the incorporation of the town of Wilmington came up for consideration at Wilmington by the people. I don't know how soon subsequent to the passage of the Act any action was had, but some time subsequent to the passage of the Act, Frank Cowdin, who was the Justice of the Peace, passed the word among the citizens to some extent—I don't know how much—that there would be a preliminary meeting to informally nominate officers for the incorporation. The citizens to the number of fourteen, met in his court room and nominated a Board of Trus-

tees, clerk, treasurer, whatever officers were called for, to be voted for thereafter. Subsequent to that time I have an indistinct remembrance that we had another meeting—whether it was a formal meeting or not I do not know, but it became the sentiment of the whole community that it was a mistake. If there was a second meeting—and I am of the impression there was, whether formal or not—we met together, and it was considered that incorporation was a mistake on the part of the people there, and that nothing further would be done in the matter, and nothing subsequent was done. There was no election ever had. I surely attended the first meeting, and I have
 256 an impression that I attended a subsequent one, but my recollection of that is very vague. This was not long after the passage by the legislature of the Act, if that was in 1872.

Mr. ANDERSON: The Act was approved February 27th, 1872, at the same session of the legislature.

WITNESS: My impression is very strong that the meeting I have spoken of was within, at the most, a very few months after that. To the best of my recollection it was some time during the year 1872. I was of age at the time when I attended the meeting and an elector of the county, and was nominee for town clerk. I know all this that I have been testifying to, from my own knowledge. I would have known if anything else was done, and there was nothing else ever done.

Q. State how that territory was treated by the county of Los Angeles, with respect to government, prior to the incorporation of the present city of Wilmington, which was effected on or about December 26th, 1905.

Mr. WEBB: We object on the ground it is incompetent, irrelevant and immaterial, having no tendency to prove any fact in issue here.

The COURT: Objection sustained.

Q. State whether the county had charge of the roads within that town while you lived there, or within that territory prior to the present incorporation of the city of Wilmington.

Mr. WEBB: Same objection.

257 The COURT: Same ruling.

The WITNESS: I know of the county spending money on the roads in that territory subsequent to 1872, and prior to December 26, 1905. They had a county road overseer there, who used to collect the road tax very promptly. I never heard of any municipal taxes—city taxes—being levied there prior to the present city of Wilmington.

Cross-examination.

By Mr. ANDERSON:

There might have been as many as 15 present at the first meeting that I have testified to, at Wilmington. I should think not more than that. The second meeting is rather vague in my memory. Whether it was a formal meeting, or whether—Judge Cowdin kept

a saloon in connection with his justice of the peace office, and we used to congregate there more or less in the evening. Whether this was a formal meeting, called meeting, or whether we all met there for social purposes and talked the thing over, I am not quite sure. The fact that the judge kept a saloon has nothing to do with the vagueness of my memory.

A. A. POLHEMUS, a witness called on behalf of the defendants, being first duly sworn, testified substantially as follows:

Q. Where did you reside when you were navigating in the harbor of San Pedro?

258 —. At Wilmington, from 1860 to 1879, with my family, after I had a family. When I first moved there I had no family.

Q. Do you know whether the town of Wilmington ever organized under the Act of the legislature of 1872 or not?

A. Yes, I know.

Q. State whether it organized or not.

A. It did not, the citizens had a little public caucus and decided not to do anything. The town did not formally organize. No trustees were ever elected. The only trustees ever elected were school trustees, and that was under the county law. We elected school trustees every year and had a school government; that was all the government we had there. I know about the ways that were constructed in the inner basin. That is, what we now call the inner basin of the inner harbor for taking up scows and boats for repairs. The Los Angeles & San Pedro R. R., or the Southern Pacific built those ways in the early seventies, but I cannot tell which one, and I cannot tell just when. They were used for taking up and cleaning the lighters. Formerly they had been above Canal street, and they were moved down from there down to the west basin and was there a few years and then they were moved to Mormon Island. The lighters were taken up in those ways and at extreme high tide occasionally tug boats. The tug boats I refer to are the Los Angeles and
259 the Cricket. The draught of each of those tug boats was about 32 inches. The lighter drew about 20 inches unloaded. The tug boats could only be taken up on the ways at extreme high tide. They could not be taken off on any other tide. We generally rushed them up there and cleaned them and got them off on the same tide.

In navigating the main channel to Wilmington I have observed changes in the channel. The water shoaled in places first, and then materially shoaled the whole length, that is, the drift that came down there year after year made a less depth of water. That drift came down the San Gabriel river; when the heavy rains come down they would come down and there would be drift and all sorts of stuff down there. I have seen patches of drift there with a dozen rabbits on it, floating down, rabbits and snakes, and the water out at Mormon Island would be so fresh you could drink it. It came down in freshets. I remember the freshet of 1862. The freshet water or flood water of 1862 covered all the low land there and a big lot of

the debris and silt was left when it passed off. There was much silt and soil in the water that came down in the freshet. Those floods extended all the way from the Cerritos Hills, covering the whole flat from the Cerritos Hills to the ocean and you could go in a skiff right from the Cerritos Hills to the ocean. Sometimes the floods
260 would be two or three years apart. None of the floods were as big as the one in 1862, but they would flood the whole flat there at times, with fresh water.

Cross-examination.

By Mr. ANDERSON:

— Captain, there has been a gradual filling up all over the bay, hasn't there, to some extent?

A. To some slight extent, yes sir.

The tug boats drew only thirty inches of water and we could only take them up at high tide. I won't say extreme tide but high tide. There was a small channel that ran up to the marine ways. It was just a natural bottom.

Redirect examination.

By Mr. GIBSON:

— You say that there was a general filling up of the bay, or the flat. Did you notice ever any place where it was washed away or where it appeared to be washed away?

A. It would deepen one side of the channel, it would shoal apparently on the other. For instance, the channel used to lay right against close up to Cape Horn, what they called Cape Horn. The channel just turned the corner. Cape Horn is a point just above Mormon Island. The channel used to lay around there, and afterwards it began working off westward and it got very shoal near that point. That is the point referred to as Cape Horn, right northeast of Mormon Island. The channel went away over—the lower
261 channel used to be, in the olden times; we could come right up close by Smith's Island and right up to the Kerckhoff Lumber Co., right there, and go up to the main channel; and finally there was a middle ground started in the middle and kept making and making until it joined, like a peninsula, and we had to keep close to that, what we called Rattlesnake Island, shore, to go up. That was a permanent change. The channel is over on the Mormon Island shore, by Rattlesnake Island. I refer to what is now known as Terminal Island. By shoaling I mean the waters were made shallow.

I do not know much about the slough between Smith's Island and the mainland or Boschke's Island and the mainland. It was not a main traveled channel and I paid little or no attention to it.

ALFRED E. MCKENZIE, a witness called on behalf of the defendants, having been first duly sworn, testified as follows in substance:

I reside at Santa Monica. I have had experience in connection with tide lands diked off from the sea at Truro, Nova Scotia. I have seen the tide land in the inner bay at Wilmington. I have been practically all over them. I have lived at San Pedro; done business there for a year; launch business. I sailed power launches going over the bay. At Truro, on the bay of Fundy, the
262 tides raise over the land, and they make dikes from four to ten feet high, and when the tide comes in it protects it from flowing over the land, and they cultivate it, raise all kinds of vegetables, hay, and so forth, timothy hay is the principal product; and they have no trouble whatever—simply take a spade and throw this land up and build this dike to the height required. But for the dike the tide would go over and overflow the land. I am speaking of the part of the Bay of Fundy called Minas Basin. The vegetable products I have seen on such lands include potatoes, carrots, turnips, and in one instance, one place, I know they raised strawberries. I have seen those dikes constructed myself. After the construction of the dikes and the exclusion of the salt water they could get a crop of timothy hay off of it probably in the following year. They raise a crop on it right away. By cultivation I mean plowing and sowing the seed. I lived there at Truro all my life before I came to California. I came here in 1892. My age is 43. I have seen miles and miles of tracts enclosed from the tide there on the Bay of Fundy. That whole country in fact, all that tide land country is all that way. The sea would not go through the dikes. They kept out the sea. In fact that tide land is considered about as valuable as any land in the country. They call it marsh land there. In some cases where the water will get on the land, they cut a drain and use a flood gate
263 to let the water out. The gate is simply opened up and the water will go out with the tide. It would not flow out with the high tide, but the water is so little, it is trivial, you know, it didn't amount to anything. The gates are closed with the tide coming in, and it probably might seep in a little any extraordinary high tide, or the dike might not be high enough, and to protect them they build the dikes higher. Those gates are opened at low tide to let the water out. I don't just recall what kind of gates they are—just simply an ordinary gate. There are so very few of them used that I don't recall only one or two instances. They are made out of boards, ordinary rough boards, stuck down in there to keep the water from coming in. I have seen the land at Wilmington Bay on the tide flats. It is practically the same thing as far as the matter of reclaiming by dikes is concerned, as the lands I have just described. There may be a little difference in the color of the soil but it is just the same thing. It appears so to me. Just a mud flat. I used to shoot ducks there, just the same as I have down here.

Cross-examination.

By Mr. ANDERSON:

The rainfall in that country I could not tell without looking it up. They have quite a little there. There is a great deal more rain there than here. No pumps are used behind those dikes,—neither wind mills or power pumps of any kind.

Q. How did you get the water out of there after exceedingly heavy rains?

264 —. In the spring of the year, as I say, they have these drains; but what little water there is in the spring of the year, a flood or a freshet, it goes into the ground. It is not flooded to amount to anything.

I am perfectly well aware that the tides in the Bay of Fundy are higher than almost anywhere else. There is also one tide each day that is higher than the others. The locality that I am referring to now is Minas Basin, which is quite a distance from the Bay of Fundy proper. At the place that I testified about the tide rises quite high; it varies in places you know.

Q. The average water level of the land, however, is so low that the spring freshets that come, or the heavy rains, sink into the ground?

A. Well, understand me, when I speak of a freshet I am speaking of the snow and ice, you know, which collect, and it melts and goes into the ground. That is the idea, what we call freshets.

I have had experience in growing crops upon these lands. My father owned some property that I have referred to there. I have never tilled any of the soil myself. I have never had any actual experience in growing crops upon these lands, except to buy the crops from the people there which I done each year. I have noticed them digging down into the bottom of those lands from time to
265 time. They would dig out trenches, making their dikes, they would probably go in four feet—it varies. In building these dikes, they would just throw them up, and use the earth right on the ground; I mean on the outside. Perhaps on both sides they would dig down and throw it up. The soil on the bottom as I noticed it, is a sort of slimy mud, shells in it, and so forth. It is so slippery you can't stand up on it.

I am familiar with the movements of the tide and know what is ordinary high tide and what is extreme tide. Referring to the Bay of Fundy, high tide is 80 feet, and the ordinary tide is 60 feet, but this is not on the Bay of Fundy that I am speaking of, it is Minas Basin. On the lands that I speak of if the dikes were not there the tides would flow over the land every day. I am most assuredly certain of that. The distance from the dikes to the edge of low water, when the low water is out in that country varies according to the slope of the land. In some places only a few feet, and other places quite a distance, owing to the slope of the land. In building those dikes, they keep moving them out from time to time. They get them right up to the channels. In some cases they are diked on all four sides, where there is a creek or something of

that sort runs up. They dike the creeks and dike everything to keep all the water from overflowing.

266 Redirect examination.

By Mr. GIBSON:

In constructing these dikes they do not put anything at all with the soil to hold it in place. They use what they call a diking spade, which is made for that purpose, and they simply cut the soil and throw it up into a mound or pyramid shape to the height they wish. The grass grows there on the sides of the dikes.

HENRY BALY, a witness called on behalf of the defendants, being duly sworn, testified substantially as follows:

I have lived at San Pedro for years. I lived at Wilmington from October, 1876, to November, 1879. I have been at Wilmington—to visit there—since 1879 quite frequently. I am acquainted with the water wells on Canal st., near the bay front at Wilmington. I know of two wells in the Banning shops that used to supply the city of San Pedro with water. I first became acquainted with those wells after I came back in 1889, along there. It was then that I was up there in the shop and seen the wells there. Those wells continued to supply San Pedro with water until the San Pedro Water Company got their franchise and supplied it from a well up on the college grounds. That must have been ten years ago. The shipping was supplied from two wells near Canal street. It was the
267 only source of supply at that time. I know of other wells around the inner basin. I put down a well myself, that is myself and another man, we drove a pipe down six feet in the ground right in front of Jacoby's store on the corner of Canal and First street. We were pumping there inside an hour and a half. We just drove the pipe down six feet. It was used for drinking purposes. We used it in the store there, and they were still using it when I left there in 1879. I know about a place called Los Barillos. There was a spring there. That spring was below the line of high tide. It was covered at high water. The fresh water used to come out there at low tide. I would get fresh water there at low tide. The spring was situated 12 or 15 feet from the high water mark. It was about straight south I should think of the most westerly street in the town of Wilmington, right in the bend, back in the bend where the wagon road comes down to go to Wilmington. The first windmill as you approach Wilmington on the road around the bay is pretty close to where those springs are. That wind mill is close to the shore just before you make the turn.

Cross-examination.

By Mr. ANDERSON:

When I say that Los Barillos spring is below high water, I mean ordinary high tide, not extreme high tide. I should think it was from 12 to 15 feet below the ordinary high tide mark. I
268 am speaking of that spring from my own knowledge. There used to be three years ago—some barrels there—that was why

it was called Los Barillos. You could see a kind of a box or barrel out in the mud. The land is low there—a kind of a low swale that goes back from the bay.

JAMES B. PARKER, a witness called on behalf of the defendants, being duly sworn, testified substantially as follows:

By the Court:

I live at Ocean Park, I am a gardener. I follow that business there at Venice. I have been engaged by the Abbot Kinney Company in Venice in connection with gardening on the sea shore. I know of my personal knowledge of the reclamation of land along the Venice Canal, so called, upon which flowers, trees, shrubs, and other vegetables have been planted. We have this dirt that was taken out of these canals or soil, was thrown up in piles and leveled off between the canals. This gardening I speak of was for the Abbot Kinney Company and has been done on soil which has been taken out of the canals and put on the banks. It grows vegetation of all kinds, there is beets, rye, all kinds of garden truck. I have not been putting in a garden, just what I have seen on the land. Flowers do fine. It has been producing flowers for three or four years.

269 I have been there two years. I have had charge of the entire canal. Out between the canals, away from the flower beds there, we grow barley, potatoes, beets, flowers. Trees occasionally; pepper trees, blue gum, red gum, sugar gum. Those last are eucalyptus trees. Several trees are up to 25 or 30 feet high; about 3½ years old. That soil is raised about 2½ or 3 feet above the level of the water in the canal. Some of the dirt taken out of the canals was sand and loam, some of it was very hard pan. These canals were dug in the marsh and sand just back of the ocean. Those canals are filled with salt water and are below the tides from the ocean. There is a little coat of cement on the side of those canals but not on the bottom. I think those canals I have referred to connect with the water at Playa del Rey. The canals are filled by an intake pipe from the ocean. I have seen the soil at Wilmington Bay; I have seen the soil on Mormon Island and the adjacent land where it is pumped up there. That is a great deal better soil than that which came out of the canals at Venice.

Cross-examination.

By Mr. ANDERSON:

We have more clay and hard pan at Venice than that soil at Wilmington. These canals I speak of are practically artificial canals cut into the streets. The water is let in there and kept up by gates—not allowed to run.

270 Q. It stands about two and a half feet above the level of the water?

A. About two feet.

Those canals have from three to three and a half feet of water and are about five feet deep. Those gardens are watered by artificial irrigation.

HOMER HAMLIN, a witness produced on behalf of plaintiffs, being duly sworn, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I am city engineer of the city of Los Angeles, and have been an engineer about 22 years. I was employed by the United States Reclamation Service from 1903 to 1906, at Yuma, Arizona. I have made a study of soils in connection with reclamation so far as it refers to the irrigation of land. That involves, in a general way, the study of soils and the effect of salts upon them, and alkali. My experience in the Reclamation Service involved the building of levees for the purpose of keeping the water of the Colorado river off from the lands below Yuma. I am familiar with the soils throughout the Imperial Valley, in a general way. I have been over the country. I am acquainted with Wilmington Bay. I have examined the soils, earth or deposits in that bay, and have seen the dredgings from the various dredgers. I have observed the
271 formation where the channels cut through the deposits. I have, in a general way, familiarized myself with the use of soils for the purpose of producing agricultural products as affected by salts and alkali.

Q. I will ask you to state whether, in your opinion, if the waters of the bay Wilmington were excluded from those portions of the bay which lie below high tide, ordinary high tide, if such portions would be capable of producing crops or vegetation of a horticultural or agricultural character.

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial, and not shown that the witness is competent to express an opinion on the subject.

The COURT: Objection overruled.

A. In my opinion they would not be suitable for agriculture in that condition.

By Mr. ANDERSON:

Q. I will ask you to state whether, or not, in your opinion, after that land was diked with dikes thrown upon the surface, whether the waters of the bay would be excluded from such lands, below the line of ordinary high tide?

Mr. GIBSON: Same objection.

The COURT: Same ruling.

A. Not entirely, because of the perviousness of the soil, and the percolation of water under the dikes. If the dikes were of the same material, water would probably percolate to some degree, through the dikes.

272 Cross-examination.

By Mr. GIBSON:

The reclamation work I was engaged in along the Colorado river, had to do with fresh water. I never had any experience with salt water. I never had any experience with excluding salt water from land anywhere. I never saw any land from which salt water was excluded by dikes, that was used for cultivation. I never saw farming carried on on any reclaimed land that had formerly been covered with salt water.

I don't know anything about the growth of any vegetable matter on any land reclaimed from salt water, either by being raised above the water, or by having the water excluded with dikes. I know nothing of it either from personal knowledge or observation. All my testimony given here as to non-reclaimability of the land in Wilmington Bay is based on theory entirely. I never made an analysis of the soil of Wilmington Bay. I don't know what that soil contains or what its chemical constituents are.

Redirect examination.

By Mr. ANDERSON:

That soil would undoubtedly contain salt. In my opinion land that underlies the bed of a salt water bay contains salts.

Recross-examination.

By Mr. GIBSON:

273 I don't know how much salt that land contains, nor how little. I do not recall now the percentage of salt in sea water. I know that seawater has some salt in it.

Redirect examination.

By Mr. ANDERSON:

I took these two photographs—on October 12th—from about the end of J street, Wilmington. One of the photographs was taken at 8:45 in the morning when the tide given in the tide tables was plus 5.7 that is 5.7 feet. The other photograph was taken at 2:45 on the same day. The tide table gives the height of this tide as plus .8.

Mr. ANDERSON: We wish to offer this in case #64536.

Mr. GIBSON: We object to that as incompetent, irrelevant and immaterial, not tending to show the character of the land with reference to the tide lines at the time that the several applications were made and approved, or at the time that the state of California was admitted into the Union, or at any time prior to the commencement of the several suits on trial here.

The COURT: Objection overruled.

The photographs referred to by the witness were introduced in evidence, and marked Plaintiff's Exhibits Q and R, respectively, in case No. 64,536.

274 Mr. ANDERSON: We wish also to offer them and consider them in evidence as to other cases affecting the west basin, subject to the same objection as made in this case.

WILLIAM MULHOLLAND, a witness called on behalf of plaintiff, being first duly sworn, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I am an engineer by profession, and have been for nearly 30 years. I have farmed on my own account for the last 20 years or more; that is, I have owned a farm and operated it. I have made a study of geology and kindred subjects. I have studied geology—somewhat elementary—in connection with engineering subjects. I have studied the constituents of soils and the salts usually contained in soils, the natural product of rock disintegration tending to make soils. That study has extended over a period of 15 years or so. In a general way I am familiar with the affect of salts or alkali in lands upon vegetation, as related to ordinary farming operations.

I have been familiar with Wilmington Bay since 1878. I am familiar with the general character of the earth or soil which constitutes the bottom of that bay as shown by the dredging. I am generally familiar with the bay and its channels.

Q. I will ask you to state whether or not in your opinion, 275 if the water of the bay should be excluded from the mud flats composing the bottom of the bay, those mud flats would be capable of producing crops or vegetation other than vegetation of a marine character.

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. Not unless excluded from invasion underneath the dikes.

Q. Assuming that dikes were thrown around the mud flats, those mud flats being below the line of ordinary high water, state whether or not in your opinion the water would be excluded from the flats by those dikes?

Mr. GIBSON: That is objected to as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness on a matter that is for the court to find upon.

The COURT: Objection overruled.

A. No sir.

Cross-examination.

By Mr. GIBSON:

I have observed the material dredged from the bay in the order of its occurrence through the various strata. That was about, I would say, half a mile above San Pedro and the other points above there. I could not say how many points—my view was rather general. I did not make those observations west of the Southern Pacific

276 tracks at all My surveys and observations were made within a year and a half, or two years The material that I examined was discharged by a suction dredger. They were working in clay at the bottom at the particular time I have a recollection of, but the clay was overlaid by sand. There was a cutter at work at the mouth of the suction pipe that brought up the earth. I don't know the depth from which it was brought, except by hearsay. The natural soil on top there in the bay is muddy silt. I could not say definitely how deep the silt is. It is pervious to water. I should judge it to be the erosion or detritus that was brought down into the bay from streams above. That is the way all that bay was formed in there. It is a dirty deposit.

I have never seen any of that soil producing vegetation of any kind after the tide waters were excluded at any place. Not in the same position as the flats of that bay occupy.

I don't know of any springs in that bay, or waters in that bay, being fed by fresh water springs.

In 1883 I was building a railroad from Wilmington to Long Beach, and myself and partner were desirous of keeping our stock out on the flat between Wilmington and Long Beach, and we searched for fresh water along there and could not find any.

Redirect examination.

By Mr. ANDERSON:

277 The reason that I testified that dikes would not exclude the water from the mud flats, is because I believe the matter composing the soil there is permeable to water. I think a superficial dike built on top of the ground would not exclude the water, even though the dike itself were impervious.

Q. And supposing the dike was built of the same character of soil. then the dike itself would be pervious to water?

Mr. GIBSON: We desire to have it understood that we object to all this line of testimony.

Mr. ANDERSON: That is understood.

The COURT: The objection will be overruled.

A. The dike would be pervious.

Recross-examination.

By Mr. GIBSON:

I have no personal knowledge of the reclamation of land by dikes along tidal rivers or along the seashore anywhere. I have made no personal observation of such reclamation at all. My knowledge of these matters is confined to reading, and a study of the theory of reclamation of that character.

Redirect examination.

By Mr. ANDERSON:

If the water was actually excluded from this soil, it would not bear crops until the salt was washed out of it. The salt could be

278 washed out by the water being lowered. The contained water in the soil might be lowered by pumping to a reasonable depth, that, is beyond the reach of capillary attraction from the surface due to evaporation, and then the salt still remaining in the soil washed out by fresh water or copious rainfall. Reclamation is rendered very easy in some countries by reason of copious rainfall, 40, 50 or 60 inches, as in Holland. The ordinary rainfalls in Southern California are not sufficient for that purpose.

Recross-examination.

By Mr. GIBSON:

I do not know whether that soil would raise beets of any kind, or not. I am quite sure it would not raise alfalfa. If it were raised sufficiently above the line of the tide, to be beyond the range of capillary circulation, it is a matter simply of the character of soil as to what you could raise on it. Speaking of that particular soil, I do not think it would raise alfalfa. If it was leached it would raise anything. You could leach it out with an abundant supply of water applied at the surface, whether that supply was natural or applied artificially. If you had to depend on the natural rainfall, I think it would take several years. That is all theoretical on my part. It is based on a consideration of the quantity involved, the quantity of salt to be leached out. I know that alfalfa will not grow where salt is too abundant. It will grow in what may be called an alkaline soil, but not a super-alkaline one, such as a
279 drained tidal estuary would be. I don't know about beets.

I don't know from actual experiment how much salt that soil contains. I know it contains sea water. Sea water circulates through it, above it and below it. I have never bored down through it. I have seen the soil extracted, dug out, full of sea shells. I have not made an analysis of the soil in order to determine its constituents.

LEE PHILLIPS, a witness called on behalf of the plaintiff, being first duly sworn, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I reside in Los Angeles. I came here in 1894, and was away for about four years. Have been here about two and a half years. I am with the Pacific Mutual Life Insurance Company. I have had experience in farming and reclamation of land—partially here on West Adams street in Los Angeles, in the draining of the Gienega swamp, and on the San Joaquin and Sacramento rivers and tributaries. The experience I had out here in Los Angeles was draining a 700 acre tract which lay just west of the city on Adams street. Following that, the reclamation of over-flowed land in and around San Joaquin county, to the extent of 48,000 acres of land reclaimed

in seven years. These lands were reclaimed by the construction of something over 100 miles of levee. These lands were down in the tidal portion of the river. The waters there are fresh, not saline. I have observed attempted reclamation of tide lands proper on the lower river. I have investigated several reclamations on the lower river where the tides are salt. I mean down on the bay. Practically the river and bay are continuous. It is hard to distinguish one from the other from San Pablo Bay on down. They have a great many reclamations in that section where they have a salt tide. I have made the subject a matter of particular study.

I have known Wilmington Bay since 1894. I am familiar with its location and the character of the land underlying it. I have been through the sloughs at the eastern part of the bay, between there and Long Beach, both on foot and in a boat. I think I made an examination of that land near Long Beach in 1902. At that time the Seaside Water Company purchased the property from the Crocker estate. I believe in 1905 I made a trip there, at the time these lands were being used for salt purposes. That trip was practically made in a launch. I have driven across the northerly limits several times, and been across the bay several times on a car. I have been to the bay since the dredging operations were going on. I have been down there twice in the last month or six weeks. I have examined the records of borings as shown on the map,

281 Exhibit H, in case #64536. (Shown on page 14 of book of maps filed herewith.)

Q. I will ask you if, in your opinion, if dikes were thrown around the mud flats of that bay at the line, or slightly above the line of low tide, and formed of the material of which the bottom of the bay is composed, whether or not such dikes would exclude the tide water from the land, lying inside of the dikes and in the bed of the tract?

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial, it not being shown that the witness has had sufficient familiarity with the reclamations of that kind, to be competent to express an opinion.

The COURT: The Objection overruled.

A. I do not believe any levee of earth would absolutely exclude the water where there is pressure. The seepage is bound to occur through a levee where the head lies above the level of the land within the extent of the seepage depending upon the cross section of your levee, and the solidity of the material with which it is built, and upon the head over and above the land, or the ditches within the land.

Q. In your opinion would there be any subsurface seepage there below the line of the levee? Below the dike itself?

Mr. GIBSON: This all goes in under the same objection.

The COURT: The same objection and the same ruling and exception.

282

A. Below the dike itself there will be by reason of pressure. For instance, if the ditches are drained artificially, you create a pressure of say three feet, even through the water is only level with the land. To whatever extent, the open area will create seepage. It will go through the soil, the subsoil, though not to as great an extent possibly as through an exposed levee. If the water behind the levee is not removed, it will still cover the land unless the evaporation is greater than the seepage, which is very unlikely in the head you would get in the case you spoke of.

Q. State whether or not, in your opinion, if dikes were constructed around the mud flats or upon the mud flats of Wilmington Bay, even though the water did not cover the surface of the area inside of the dikes, whether the land inside of those dikes would be capable of producing crops in its natural condition, after the levees were constructed, without any further engineering?

Mr. GIBSON: That all goes under the same objection.

The COURT: Yes, and the same ruling.

A. It is pretty hard to answer that question by yes or no. To say that you could not raise a crop on a piece of land of that nature, would possibly be putting it a little strong. The requirements, the work that would be necessary, and the conditions that would

283 be necessary to bring about, before you could raise a crop, would be very elaborate, and a very doubtful proposition. I have never seen similar lands raise anything except salt grass. I have seen the land immediately contiguous, where tides at high tide barely reached over the land, that by careful management and by very heavy leaching, has raised some crops, but it has not been where tides regularly covered the lands, and created a mud flat—that is, a sticky soil such as that soil is. It might be possible there, but the expense is a prohibitive expense as regards any crop that we raise in this country. The question of drainage is the thing, and sunshine, that goes to make good soil out of swamp land. On a reclamation project the extent of the area of the land involved is a material question.

The reclamation of lands similar in character to those located at Wilmington that I spoke of seeing tried, was on San Francisco Bay, within the last six or seven years, and continuously to date. None of those efforts have proven successful. I have observed three instances of that kind on a large acreage.

Cross-examination.

By Mr. GIBSON:

One of those three instances was on the lands belonging to John W. Ferris, near Ignacio, I think. His acreage was something like three thousand acres. The lower half was very similar to

284 this, even in a more favorable condition. Land that is similar to the land that lies along these channels in the Wilmington marsh. One of the other instances is near Mare Island. The third one is on San Pablo Bay. I don't know the name of the

owner. I was called upon to look over those lands with a view to purchasing. I visited the lands of Ferris on four occasions. I didn't see them before the reclamation was attempted. He attempted to raise barley, grain, various crops. I saw some crops growing on the upper end, about a mile and a half from the dikes. I also saw salt grass growing on the lower end. Nothing else. I saw the land on which the salt grass grew being plowed. I didn't see it sowed. I saw the result of the sowing, and I say it did not grow at all. That soil was sort of a mush, slippery, slimy stuff, before it was reclaimed, and while I didn't see it before it was reclaimed. I saw the portion just outside the levee. He ran his levee in to cut off the points, and then I got the character of it. I did not need to dig down to get the character of it. He was plowing 18 inches deep. I saw it tried subsequent to that time, first in the season of 1903; again in 1905; and I think a year later.

Q. You saw it plowed or sowed or harvested in each of those years?

A. They were doing something of that nature, yes. I saw them ditching it at different times. He had no success with the ditches.

Nothing was attempted on the other two pieces that I
285 spoke of, except pasturage, just salt pasturage. The Ferris place would make good pasturage so far as salt grass grew, so that it was worth something after it was diked off. I have never had any actual experience in farming land reclaimed from the sea.

I have seen land that was reclaimed from the sea growing crops—not exactly what you would say reclaimed by a levee. I have seen lands up near Alameda that have been very heavily manured, fertilized—artificially made land, by reason of its location,—land which I supposed had formerly been covered by salt water. I think high tide covered it. It was marsh land. So I have seen land that would produce something after water was excluded, after artificially producing it as you would with a hot house.

I know of fresh water springs in the region of Cerritos slough—above by the Anaheim road, quite a water producing section. I know nothing about the fresh water springs down at the bay near Wilmington.

Q. Assuming there was a large amount of fresh water going down from the hills, and finding its outlet in the tide flats, and they were diked off, would that make any difference in your opinion whether they were cultivatable or not?

Mr. ANDERSON: Objected to as assuming a fact that is not shown to exist.

The COURT: Objection sustained.

286 Q. If there is fresh water percolating at various places in and adjacent to this basin, the east basin and the west basin and all the Wilmington San Pedro Bay, would that make any difference, in your opinion, as to reclaimability of the lands by diking them off from the sea?

A. None whatever. The fresh water would not make any difference as you speak of its coming in. You would have to have

fresh water to reclaim any piece of land that has salt or alkali, but the mere fact that it percolates through the land, would make no difference whatever.

I have been to Holland. I saw the operations there on reclaimed land. Here you have a peat soil as they have originally in Holland. You can draw the water out of that soil for a depth. Here you have a deposit of silt mixed with a shale deposit—you have a sort of impervious strata that you can draw the water out of three feet deep. There are reclaimed lands in Holland that were formerly beneath the tide.

The salt water is kept out by the dikes and caught immediately inside of the dikes by what we call a seepage ditch. Those are pumped, from my observation—they are caught before they get into the land—and pumped out by a separate system, that is, the seepage water from the dike. That is pumped out by wind mills and motors, and they are now going to put steam plants in, and it is conducted out to sea.

287 J. B. LIPPINCOTT, a witness called on behalf of plaintiff, and being duly sworn, testified substantially as follows:

Direct examination.

By Mr. ANDERSON:

I reside in Los Angeles city. My business is supervising engineer. I am assistant engineer of the aqueduct. I have followed the profession of engineering for about 23 to 25 years. I was connected with the United States Reclamation Service, from the time of the passage of the Reclamation Act in June, 1902, until the 1st of July, 1906. My capacity in connection with that service was a supervising engineer. In connection with that service we considered the quality of soil. I made that a study in a number of cases. My supervision extended from points in central Oregon, to and including projects along the Colorado river. I had something to do with the Imperial Valley, nothing extensive however. I have made a study of soil as affected by alkali and salt, insofar as relates to irrigation and reclamation of lands. I am familiar with Wilmington Bay and with the mud flats composing it. I have seen the soil there. I have seen the effect of laying pipe lines. I have never made any chemical analyses of that soil. I have laid pipe lines around the bay or near the bay—around the west end of the bay. The line in question ran around the extreme westerly portion of the tide
288 land shown on diagram A, and near the western limits of tide land location No. 154.

Q. I will ask you, Mr. Lippincott, to state whether or not, in your opinion, if the water of the bay was shut off from the mud flats by dikes, those mud flats from which the water was shut off would be capable of producing crops?

Mr. GIBSON: The defendants object to that as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

The WITNESS: If you mean simply by building levees and stopping at that, I don't believe crops could be raised there.

Q. I will ask you to state whether or not, in your opinion, the construction of levees from the material from which the bottom of the bay is composed, would effectually exclude water from the mud flats, the bottom of those mud flats being above the line of ordinary high tide.

Mr. GIBSON: Same objection.

The COURT: Objection overruled.

A. I think there would be seepage—a general seepage problem to be dealt with in connection with the reclamation of the lands. I do not believe I can answer that question absolutely. I think there would be some seepage through the levee, and under the levee, permanently. I think, that would have to be taken care of. The reason why I think or believe that crops could not be raised, or ordinary vegetation, upon the bottom of those flats, if the waters were diked from them, is on account of the salt contents in the land. Ordinary crops would not grow with the amount of salt, in my judgment.

Q. What is the effect of the cultivation of lands of that character, upon the capillary attraction, if anything, of the lands underneath?

Mr. GIBSON: Defendants object to that on the ground it is incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. The effect of the cultivation of lands of that character, upon the capillary attraction, is this:

If the surface of the soil becomes dry, and there is a standing body of water within five or six feet within the surface of the ground, I would expect there would be an evaporation continually from the surface of the ground, due to the capillary action of the water in the soil; and that evaporation which would be continuous, generally speaking, or during the dry period would be continuous, would create a continued deposit of salt on the surface of the ground.

Q. Mr. Lippincott, state by what method, if at all, those lands could be reclaimed.

Mr. GIBSON: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. There would be three things necessary: First, a leveeing of the tidal waters off of the land; another, a system of drainage that would permit the pumping out of the sump, and keeping the salt water from 5 to 6 feet beneath the surface of the ground; and the third would be the irrigation of the surface of the ground with fresh water.

Q. What would be the object of the irrigation of the ground with fresh water?

A. Largely to carry the contents in the soil downwards to the level

of the ground waters, from which it would be pumped. In other words, wash out the salts.

Q. Calling your attention to the channels delineated on Exhibit H in case 64536, and the map marked plaintiff's Exhibit G in case 64536, and stating in explanation that this line, adjoining these channels, is marked one foot above zero, zero being the mean of lower low water,—I will ask you to state in what way that would affect the expense of reclamation, assuming that the channels were compelled to be left open.

Mr. GIBSON: Object to that on the ground that it is incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. If the lower low water channels had to be kept open, of course it would help to increase the length of the levees that would have to be built.

Q. In your opinion what sized levees would be required to reclaim lands of that character, and to reclaim that particular
291 land if there was an attempt made to reclaim it by shutting off the water.

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. The top of the levee should be five feet above the highest water mark, and it should have a slope of two and a half feet horizontal, to one vertical on the inner or land side, and three and a half feet horizontal to one vertical on the water side, and about twenty feet wide on the top.

I have made a rough estimate of the expense of placing dikes of the character I have described, upon the tide lands in that bay, and keeping the channels open.

Q. State what was the result of that estimate.

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial, and on the further ground that it is vague and indefinite as to the channels or channel.

The COURT: Objection overruled.

Mr. ANDERSON: From what map did you get the channels? Were they substantially the same as shown upon the map Exhibit H.

A. It was a Federal map, I believe, prepared by the Coast and Geodetic Survey, on which the low water line was shown, and on which the high water line was shown, apparently similar to the map referred to as Exhibit H.

Mr. GIBSON: We object to that on the further ground that
292 it is hearsay and calling for secondary evidence.

The WITNESS: The map from which I made the estimate purports to be a map of San Pedro Harbor, showing harbor lines, United States Engineer's office, Los Angeles, California, July 17, 1908.

Technically that is a blue line print. It is the same as plaintiff's Exhibit G in case 64536.

Mr. ANDERSON: I renew the question as to the result of your estimate.

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. That the cost of the dike would amount to over three hundred dollars per acre reclaimed. That does not include any cost of re-draining this by pumps.

Cross-examination.

By Mr. GIBSON:

I designed that the material be taken from the channels to build the dikes of the dimensions I stated. I considered the levees as set back thirty feet from low water mark. I figured the cost at ten cents per cubic yard to put in dikes. I figured on taking the earth from the channel with a clam shell dredger. Of course you could build bulkheads, but I think that would be more expensive.

I have seen the reclamation that has been carried on down
293 there. I have never visited Holland nor Ireland, where the lands were diked out from the sea. I have never been along the coast of Fundy where large tracts are diked out from the sea and under cultivation. I have never seen any large tracts in this country diked out from the sea, under cultivation. I have seen the reclamation near the mouth of the Sacramento river, but I would not call that reclaimed from salt water. The tide reaches to the city of Sacramento, and this reclamation is below Sacramento, but in the Sacramento river the salt water does not go up as high as the tide goes. The tide goes up the river, and the salt water does not go up. It is a question of the modification of the grades of the river near its mouth. The rise and fall of the tide near the mouth of the river will affect the grade of the river up stream, quite a ways, and the rise and fall of the river may be simply a rise and fall of the hydraulic gradient of the river without necessarily making an actual inflow of salt water to that point. It does not affect the natural grade of the river as determined by the bed of the river, but it affects the course of the surface water. In tidal rivers the salt water rolls over the fresh water near the mouth of the rivers. The salt water goes up a portion of the Sacramento river, but not as far as the tide. I know that there is a tidal movement that can be discerned on the flats of Sacramento, but it is my impression,
294 without having certain recollection of it, that the salt water in the Sacramento does not go much above Antioch. It is below the mouth of the San Joaquin at any rate. I am not speaking from personal knowledge. Personally I do not know how far the salt water goes up the Sacramento.

I don't know anything about fresh water flowing into the inner bay of San Pedro from springs. I have heard of floods of the San

Gabriel, or the Los Angeles river, going down there. I have made investigation, generally, as to the subterranean water sources between Dominguez and Signal Hill over towards Long Beach. There is fresh water in wells in that region. The fresh water does not percolate into the bay that I know of. I am speaking now of the water near Signal Hill. There are other wells along the northerly side of Wilmington Bay, where I think fresh water stands, probably, at low tide, sea level, low water level, or below that. I don't know where the water of the Cerritos slough goes to. I don't know where Captain Ord's well is, some times called Los Barillos. I don't know of any other springs around there. I don't know of any other water seepages around there. I don't know that you can go at different points in the inner bay at extreme low tide, and dip up fresh water in various places.

Q. Supposing that were the case, would it affect your
295 opinion as to the contents of salt in the soil?

A. Yes, so far as the immediate locality where the rising fresh water was found. If it could be shown that there was a particular sheet of fresh water rising under that bay, I should think that would be an argument that would favor reclamation of those lands. If it was an isolated spring, I should not think it would add very much weight to the question.

I have never personally seen the large sheet of fresh water lying in the flat between Dominguez and the Signal Hill country. I know there are a number of wells showing fresh water in that region. The fresh water in the wells I am familiar with, is perhaps ten or fifteen feet beneath the surface of the ground. There are artesian wells at Signal Hill, in near the margin of the bay. The artesian wells on the northerly side of Signal Hill formerly raised water ten or twenty feet above the level of the ground, but they do not do it any more. I think the artesian wells on the north side of Signal Hill are about 100 feet above sea level. Chemically, the water of those artesian wells, called the Bouton wells, is of very similar quality to the water in the wells at Wilmington known as the Seaside Water Company's wells. The dark color that the water has is on account of peat stain. The waters are similar in color, although the wells are

20 or 30 miles apart, and show that the water passes through
296 a peat stratum down below right in the wells. Those Wilmington wells are half or three quarters mile from the tide waters of the bay, northerly. I think the surface of the ground where the Wilmington wells are is about 20 feet above tide water. They are seven or eight hundred feet deep. I know that there were old wells at Canal street where San Pedro got its supply. I think they were surface wells—not very deep. I don't know how near they were to the bay, but I should say 1500 feet. I have examined that water.

Redirect examination.

By Mr. ANDERSON:

The artesian water never reached the bay because it couldn't get there.

Recross-examination.

By Mr. GIBSON:

I don't say that the water farther down from the Bouton wells, between Dominguez and Signal Hills, could not get to the bay. I don't know that there is anything to prevent that sheet of water from reaching Wilmington. I think the barrier is impervious between the Bouton wells and the bay.

N. A. BREEN, a witness called on behalf of the plaintiff, being first duly sworn, testified substantially as follows:

297 Direct examination.

By Mr. ANDERSON:

I reside at Wilmington. I have resided there 22 years. I am engaged in the real estate business. I have been in farming all my life except until very recently; at Wilmington, Santa Barbara, Vermont where I was born. I am familiar with the mud flats of Wilmington Bay in a way. I have seen them a good many times. I have been over them in a boat. I have seen the land at high tide and at low tide. I am familiar with the soil of the lower part of Wilmington down about Canal street and along the edge of the bay there. The soil of the lower part of Wilmington is very similar to the mud flats only of course the water does not run over the soil of the lower part of Wilmington at high tide. The soil is similar in character. I have observed attempts to make vegetation grow, upon the lands close to the north line of the bay of Wilmington; along Canal street in several places. I have observed Mr. Mahar's place between Third and Fourth streets. I have observed Mrs. Ganaway's and Mr. O'Brien's place. I am familiar with the country that extends northeasterly of Wilmington, easterly toward Long Beach. The soil between Wilmington and Long Beach is similar to the soil that is being dredged at the present time—very much. I have observed efforts at farming in through the flat country northeast of Wilmington.

298 Q. I will ask you, from your experience as a farmer and your observation, to state whether or not in your opinion the soil or the earth of which these mud flats is composed would, if dikes were thrown around them and the water kept out of them, be capable of producing vegetation?

Mr. GIBSON: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. No, I don't think it would, in my opinion it would not produce crops.

At Mr. Mahar's place, they filled that land up three or four times. Then they would dig it out. The first time they filled it up, and then they dug it out and put in new dirt and planted flowers. This soil would come from the higher ground, and then

they would irrigate that, and maybe for a short time the flowers would do very well, and then they would simply begin to die out, and then they would dig that out and bring in more dirt. The continual watering would cause the salt—some call it alkali, I call it salt,—to rise, which caused the flowers to die out. The ground would become white on top. At Mrs. Ganaway's and at Mr. O'Brien's the same thing happened. They put about two or three feet of soil on top. I don't think anything could be produced on those lands without bringing in foreign dirt. I think Mrs. Ganaway's yard has two palms—that is practically all.

299 Cross-examination.

By Mr. GIBSON:

I have had no experience in farming by diking out salt water. I never did see any. I never saw any attempted. I know that alkali exists from Wilmington to Los Angeles in different places where it is white on the ground. Wherever that exists the land will not grow vegetation. That is the kind of soil that exists at Mrs. Ganaway's and all over that country practically. I don't know that crops are raised in some portions of the Palos Verdes Ranch down to the edge of salt water. I don't know of any soil that has been pumped from the bay that will raise vegetation. I never saw any. I never saw a growth on what is called Smith's Island or Boschke's Island. I never saw that pepper tree there. I understand that there are some gum trees there but no pepper trees. I know where Mrs. Powers lives. I used to be there quite a little, but I have not been there for probably a year and a half or two years. I know there was some soil from the bottom of the bay being pumped into the yard where Mrs. Powers lives; I have not been there since that time. If it should appear that soil which was pumped out of the bottom of the bay at that point was deposited on Mrs. Power's place, and after a year or two would grow alfalfa and roses and shrubs, that would not change my opinion as to whether or not these flats would grow crops, if protected
 300 by dikes. You must remember that Smith's Island was very high land anyway, before the pumping was done, before they pumped any material on it at all. Where Mrs. Powers' house is, is pretty high land. That is the reason I still maintain the same opinion. I think it would have to be raised several feet, and then I am doubtful whether you could raise any crops or vegetation of any kind on it. Smith's Island is above high tide and was before there was any of the mud from the bottom of the bay pumped on it. There were some gum trees growing on Smith's Island before this pumping was done. I don't know what the character of the soil was before any mud was pumped on it.

Cross-examination.

By Mr. McKINLEY:

I have been acquainted with Smith's Island since 1888. I think that was the time me and Capt. Hawley and General Banning went

down there the first time. Since then I have been on it several times. I don't remember there was mud pumped on there about that period. The first I know of any mud being pumped on there was recently—five or six months ago. I never knew of it being pumped on there before. My testimony is all based on this pumping that was recently done there. I don't know that four or five feet of mud was pumped on Smith's Island where Mr. Powers testified to.

I have been engaged in farming practically all my life. I
301 have been farming at Wilmington for Mr. Banning. I left

Mr. Banning's employ about 8 or 9 years ago. I was not farming on any lands there was mud on or anything of that kind. The lands which I farmed were up on his ranch—at the home place; down at Wilmington at the Banning home place. I have been engaged in farming up until about three years ago on the Banning place. My experience in Wilmington has all been on the Banning place. Since then I have been renting a good deal outside. The land I have been farming is located about three blocks from the water front. Vegetation grows nicely there. There is no alkali there. I don't know as to any difference between salt and alkali. One is white; the other is white too. As an expert farmer I have not given study to that particular branch of the subject. The land that I have been farming is on the upland.

OLIVER MCCOY, a witness produced on behalf of the plaintiff, having been first duly sworn, testified subsequently as follows:

Direct examination.

By Mr. ANDERSON:

I reside in Wilmington. I am a farmer. I have farmed in California the last thirty years. I have farmed on a place between

Wilmington and Long Beach for seven years—northeast
302 from Wilmington two and a half miles, and northwest from

Long Beach on the flat. I have also farmed on the farm I live on now—100 acres at the northwest corner of Wilmington. The flat that I speak of is the flat country that lies between Wilmington and Long Beach. They call that the salty lands. I have been familiar with the soil in the bay itself—the mud flats. I know about farming up there on the flat. Some of that land would raise something and some would not. I know the character of the land that composes the mud flats in Wilmington bay. I do not know other farms or other persons who have tried to farm in through the flat country to the northeast of Wilmington and between that and Long Beach. It has been over twenty years since I left there and I don't know any one there now. At that time I knew other persons who tried to farm there.

Q. Mr. McCoy, how does the soil of the mud flats of Wilmington bay, or the earth which composes them, compare with the soil in the flat land that extends up northeast of Wilmington and in the locality where you said you farmed and observed others farm years ago?

Mr. GIBSON: Defendants object on the ground that it is incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

303 A. Well it is all the same, it looks the same to me. In my opinion the mud flats of Wilmington would not be capable of producing crops if the water was kept from them by dikes.

Cross-examination.

By Mr. McKINLEY:

I have not made any examination of the mud flats of Wilmington only from the looks of them. I have just seen them in passing by. I never dug them up or planted in them or farmed in them. I know the mud flats are muddy.

By the COURT:

I have never seen any of the soil from the bottom of the bay taken up and deposited somewhere else and farmed. I know that there are places where the soil has been taken from the bottom of the bay by dredging and deposited somewhere else. I am not personally acquainted with Smith's Island. I have never been on the Island any closer than the lumber yard. I know there is a dwelling house on the island in the immediate vicinity of the lumber yard. I have never been at the house. I have been by it on the cars. There are some trees there I think—eucalyptus. I did not notice anything else. That was some years ago. If it was a fact, that soil had been pumped out of the bottom of the bay and deposited on Smith's Island, not mixed with any upland soil at all, and then after a year or two would grow alfalfa and vines and vegetables and shrubs and flowers—I would have to see it before I would
304 believe that. If I would see it I might take a different view of the question. I don't know anything about any other soil having been mixed with mud which was deposited on Smith's Island. I have no reason to suppose such was the case. The reason the soil that was at the bottom of the bay, if protected from the overflow of the water, would not grow crops is because the salt water has been standing there for years. I do not know any place personally in Wilmington where attempts have been made to grow vegetation in the vicinity of Canal street. I live in the southwest corner of Wilmington, up on the mesa there. I am outside of the city limits, on Weston St. I trade in the town of Wilmington and go there frequently. I don't know any place down town where they grow trees or vegetables of any kind until you get upon the higher land. I never observed any person attempting to cultivate the ground down town.

Cross-examination.

By Mr. GIBSON:

I never farmed any land that was diked out from salt water nor did I ever see any farmed.

Redirect examination.

By Mr. ANDERSON:

Some portions of Wilmington are higher than others. The mesa land on the west runs right down to the bay. The mesa land runs west and north. I am not enough acquainted with
305 Smith's island to testify to conditions down there.

JOHN BIDDLE, a witness called on behalf of the plaintiff, being first duly sworn, testified substantially as follows:

Direct examination.

By Mr. WEBB:

I am in the federal service in the United States army. I am in charge of the rivers and harbors around San Francisco, and of the fortifications around San Francisco; and I have supervisory charge of all the harbors on the Pacific coast and in the Hawaiian islands. I have had experience in San Francisco and Havana and Manila directly; and indirectly in Honolulu, Portland, Seattle, San Diego, and other harbors on this coast. I am familiar with San Pedro harbor although I have not engaged in harbor work there except in a supervisory way. I was on the board that established the harbor lines. I am familiar with those lines as established on the ground. The harbor lines represent the lines beyond which no construction will be allowed to be built into the navigable waters. The harbor lines include both the bulkhead and pier head lines. The bulkhead lines indicate the line to which solid construction may be built; and the pier head lines indicate the lines to which open construction, such as docks, may be built. The pier head lines may be coincident with the bulkhead lines, but are
306 usually outside of it, and of course can never be inside of it.

Q. Basing your answer upon your experience in harbor work, is the area of the harbor lines of such a character as may be improved into a harbor having water of sufficient depth for sea going vessels?

Mr. GIBSON: We object to that as incompetent, irrelevant and immaterial.

The COURT: You mean the territory outside of the harbor lines?

Mr. WEBB: Yes sir.

The COURT: He may answer.

A. I believe it is.

Q. In what way may the inner harbor of San Pedro be developed and improved?

Mr. GIBSON: That is objected to as incompetent, irrelevant and immaterial.

The COURT: You mean now the territory outside of the harbor lines do you?

Mr. WEBB: I mean the territory seaward, or outside of the harbor lines.

The COURT: Well, he may answer. Just make the statement general

A. Naturally it would be by dredging, to a sufficient depth for vessels to navigate.

Q. And in your best judgment, based upon your experience in such work is such method feasible for the development of a harbor there?

A. Yes sir

307 Q. And can by such methods a good harbor be constructed?

A. In my judgment, yes.

Q. How good?

A. You can dredge it to any depth and it will be a first class harbor to the depth to which you dredge.

Q. Basing your answer upon your knowledge of harbor development, in your judgment will the construction of slips landward from the harbor lines be feasible?

Mr. GIBSON: Objected to as incompetent, irrelevant and immaterial, and on the further ground that it is vague and indefinite as to time, place and condition of commerce.

The COURT: Objection overruled.

A. I think so.

Q. And in your opinion would that be the proper method of harbor development?

Mr. GIBSON: Same objection.

The COURT: Same ruling.

A. When commerce becomes large it is the best way to develop harbors. Of course, I cannot foresee the commerce, but I should say it would.

Cross-examination.

By Mr. GIBSON:

I know that the total frontage of both the inside and outside harbors of San Pedro and Wilmington is more than twenty miles.

The foregoing statement contains all of the evidence introduced in said cause.

308 All of the parties having rested, and the cause having been argued and submitted to the court for its decision, the court thereafter made and filed its findings of fact and conclusions of law, and judgment was thereupon rendered and entered in said cause for the plaintiffs; and the defendants thereafter, and within the time allowed by law, duly served and filed their notice of intention to move for a new trial in said cause, upon the following grounds, to-wit:

1. Irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial.

2. Accident or surprise, which ordinary prudence could not have guarded against.

3. Newly discovered evidence material to the defendants, which they could not with reasonable diligence have discovered and produced at the trial.

4. Insufficiency of the evidence to justify the decision.

5. That the decision of the court is against law.

6. Errors in law occurring at the trial and excepted to by the defendants.

Specifications of Insufficiency of the Evidence.

The defendants now specify the following particulars wherein the evidence is insufficient to justify the decision or findings of the court.

309 1. The evidence does not prove or show that the bay, referred to in paragraph II of the amended complaint, or its arms or estuaries or channels, were, on September 9, 1850, or at all or any times since then have been, or are now, navigable waters of this state, or of the United States, or used for the purposes of navigation, excepting a small portion thereof.

2. The evidence does not prove or show that the state of California is the owner of all or any portion of that parcel of land referred to in the second finding, and therein declared to be owned by the state of California; nor that the defendants have no estate, right, or title, in or to said land.

3. The evidence does not prove or show that any part of the land referred to in the third finding is, or at any time has been, a portion of the bed of the inner bay of San Pedro, or the bed of any other bay or navigable water.

4. The evidence does not prove or show that any part of the land referred to in the third finding, has been within two miles of the city or town of San Pedro at any time prior to the first day of March, 1888; or that any part of said land has been within two miles of the city or town of Wilmington at any time prior to the 26th day of December, 1905.

5. The evidence does not prove or show that any portion of the land referred to in the third finding, is not reclaimable for
310 agricultural purposes, or not reclaimable for similar purposes, or that any portion of said land was not so reclaimable at the time that application to purchase the same from the state of California, was made by the predecessors in interest of the defendants, or at any other time.

6. The evidence does not prove or show that any part of the land referred to in the third finding has, at all times, or any time, been withheld from sale by the state of California.

7. The evidence does not prove or show that the patent referred to in paragraph V of the amended complaint was a pretended patent, or that the certificate of purchase referred to in said paragraph was a pretended certificate, or that the claims of the defendants to said lands are, or that any claim of any of the defendants to said lands is, invalid or without right.

8. The evidence does not prove or show that the patent to said

lands to Phineas Banning, referred to in the fifth finding, was void, or that said patent passed no title, or that no title is vested in the defendants under said patent as to said land.

9. The evidence does not prove or show that the state of California is not estopped by the judgment and proceedings referred to in the fifth finding, from claiming any interest, right, or title, in or to the lands referred to in said finding; nor that the said judgment or said patent referred to in said finding, or the said proceedings referred to in said finding, is not a bar to said claims on the part of the plaintiffs or the state of California.

10. The evidence does not prove or show that the matters herein in litigation, were not finally adjudicated and settled by the judgment and decree referred to in the fifth finding, and the subsequent proceedings thereunder; nor that the plaintiffs are not thereby debarred from prosecuting this action.

11. The evidence does not prove or show that the only improvements that have been placed upon said lands by the defendants are the electric railway of the Pacific Electric Railway Company, and the piles and dredging of the Los Angeles Harbor Company referred to in the sixth finding; nor that said electric railway was constructed within five years prior to the beginning of this action; nor that said works by said Harbor Improvement Company were begun two years prior to the commencement of this action, nor that said works have never been completed.

12. The evidence does not prove or show that the plaintiffs are not estopped to deny the right of the railroad corporations referred to in the seventh finding, to continue the use of said land for the maintenance and operation of said railroad.

13. The evidence does not prove or show that the plaintiffs were seized or possessed of said land, or any part thereof, within five years next preceding the commencement of this action.

14. The evidence does not prove or show that the cause of action set forth in the complaint is not barred by the provisions of Section 312 of the Code of Civil Procedure; nor that said cause of action is not barred by the provisions of Section 315 of said Code; nor that said cause of action is not barred by the provisions of Section 316 of said Code; nor that said cause of action is not barred by the provisions of Section 317 of said Code; nor that said cause of action is not barred by the provisions of Section 318 of said Code; nor that said cause of action is not barred by the provisions of Section 319 of said Code.

15. The evidence does not prove or show that the defendants and their predecessors in interest have not been in the exclusive, continuous, open and notorious possession of the whole of said premises, for more than ten years prior to the commencement of this action.

16. The evidence does not prove or show that the land in controversy in this suit, or any part thereof, was not subject to purchase and sale under the laws of the state of California, at the time that the proceedings for the purchase thereof were had and taken by, and at the instance of, Phineas Banning, the predecessor in interest of the defendants, as shown by the pleadings and evidence in this

cause; nor that said Banning was not qualified to purchase
313 said land; nor that said proceedings for the purchase of said land were not in conformity to, or not in compliance with, the provisions of law relating to the purchase and sale of said land, or were in any respect defective irregular or invalid; nor that said Banning was not entitled to have his application to purchase, and survey and location of, said land approved by the Surveyor General; nor that said Banning was not entitled to receive a certificate of purchase for said land; nor that said Banning was not entitled to receive a patent for said land from the state of California.

Specifications of Particulars in Which Decision is Against Law.

1. The defendants further specify that the decision of the court herein is against law, in that the court has failed to find, and there is no finding or decision, upon material issues made and raised by the pleadings in said cause.

2. The defendants further specify and claim that said decision is against law in this: that by said decision the obligations of the contract made and entered into by and between the state of California and Phineas Banning, the predecessor in interest of the defendants, under and by the proceedings of said Phineas Banning for the purchase of the lands in controversy in this action, under and pursuant to the provisions of the act of the legislature of the
314 state of California, entitled: "An Act to provide for the sale of certain land belonging to the state," approved on the 27th day of April, 1863, as set forth in paragraph X of the amended answer of the defendants, Banning Company, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company, herein, and in the evidence introduced by the defendants in this cause are held, decided and adjudged to be impaired and abrogated by laws passed by the state of California, subsequent to the making of said contract, contrary to provisions of Article 1, Section 10 of the Constitution of the United States.

3. These defendants further specify and claim that said decision is against law in this: that by said decision the obligations of the contract made and entered into by and between the state of California and Phineas Banning, the predecessor in interest of the defendants, by and under the proceedings of said Phineas Banning for the purchase of the lands in controversy in this action, had and taken by said Banning, under and in conformity with the provisions of the act of the legislature of the state of California entitled: "An Act to provide for the sale of certain land belonging to the state," approved on the 27th day of April, 1863, and the act of said legislature entitled: "An Act to provide for the management and
315 sale of the lands belonging to the state," approved on the 28th day of March, 1868, and the acts amendatory thereof and supplemental thereto, as shown by the pleadings and evidence in this cause, are held, decided and adjudged to be impaired and abrogated by laws passed by the state of California, sub-

sequent to the making of said contract, contrary to provisions of Article 1, Section 10 of the Constitution of the United States.

4. These defendants further specify and claim that said decision is against law in this: that by said decision the obligations of the contract made and entered into by and between the state of California and Phineas Banning, the predecessor in interest of the defendants, by and under the proceedings of said Phineas Banning for the purchase of the lands in controversy in this action, had and taken by said Banning, under and in conformity with the provisions of the act of the legislature of the state of California entitled: "An Act to provide for the sale of certain land belonging to the state," approved on the 27th day of April, 1863, and the act of said legislature entitled: "An Act to provide for the management and sale of the lands belonging to the state," approved on the 28th day of March, 1868, and the acts amendatory thereof and supplemental thereto, and the Political Code of the state of California, as shown by the pleadings and evidence in this cause, are held, decided and adjudged to be impaired and abrogated by laws passed by the state of California, subsequent to the making of said contract, contrary to provisions of Article 1, Section 10 of the Constitution of the United States.

5. The defendants further specify and claim that said decision is against law in this: that in and by said decision, and in and by the necessary force and effect thereof, the state of California is permitted to, and does deprive the defendants of their property, without due process of law, and deny to these defendants the equal protection of the laws, contrary to the provisions of the Constitution of the state of California, and contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6. The defendants further specify and claim that said decision is against law in this: that in and by said decision, and in and by the necessary force and effect thereof, the property of these defendants is taken for public use without compensation, contrary to the provisions of the Constitution of the state of California, and contrary to the provisions of the Constitution of the United States.

Specifications of Errors of Law.

The defendants now specify the following errors in law, occurring at the trial of this cause, and excepted to by the defendants, on which ruling of the court the defendants will rely.

317 1. The court erred in overruling the objection of the defendants to the reception of any evidence in this cause on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendants, or any of them.

To which ruling of the court the defendants duly excepted.

2. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the diagram or map marked Exhibit A in this case (a copy whereof is found on page 1 of the Book of Maps filed herewith as a part of this statement.)

To which ruling of the court the defendants duly excepted.

3. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit B in this case (a copy whereof is found on page 3 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

4. The court erred in overruling the objection of defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit C in this case (a copy whereof is found on page 4 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

4a. The court erred in overruling the objection of defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit D in this case (a copy whereof is found on page 5 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

5. The court erred in overruling the objection of defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit "E" in this case (a copy whereof is found on page 6 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

6. The court erred in overruling the objection of defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit "F" in this case, (a copy whereof is found on page 12 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

7. The court erred in overruling the objection of the defendants to the testimony of the witness, F. C. Turner, on behalf of the plaintiffs, relative to the making of surveys, soundings and maps, subsequent to the issuance of the patent, under which the defendants claim.

To which ruling of the court the defendants duly excepted.

8. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit "H" in this case, (a copy whereof is found on page 14 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

9. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit "I" in this case, (a copy whereof is found on page 17 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

10. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit "J" in this case, (a copy whereof is found on page 18 of said Book of Maps).

11. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, S. A. Widney, on behalf of the plaintiffs, (referring to a conversation with Mr. Phineas Banning):

Q. "Just state what that conversation was."

To which ruling of the court the defendants duly excepted.

12. The court erred in denying the motion of the defendants to strike out all the testimony of the witness, S. A. Widney, relative to the conversation with Phineas Banning.

To which ruling of the court the defendants duly excepted.

320 13. The court erred in denying the motion of the defendants to strike out from the testimony of the witness E. W. Merwin, on behalf of the plaintiffs, the statement, (referring to the lines on the map, testified to by said witness as having been prepared by him, and being Exhibit "A," in this case), viz.:

"I believe them to be absolutely correct."

To which ruling of the court the defendants duly excepted.

14. The court erred in overruling the objection of the defendants to the following question propounded to the witness, E. W. Merwin, on behalf of the plaintiffs, (referring to the representation, of the location of tide land patents and harbor lines, on the map Exhibit "A" in this case).

Q. "State whether it represents them correctly or not."

To which ruling of the court the defendants duly excepted.

15. The court erred in overruling the objections of the defendants to the following questions propounded to the witness, E. W. Merwin, on behalf of the plaintiffs, (referring to the map marked "Plaintiffs' Exhibit 'D'" in this case, and to the channel leading from Timms' point up into the inner harbor):

Q. "State, if you know, what indicates the boundary of high tide along that channel."

321 Q. "State what you know."

To which rulings of the court the defendants duly excepted.

16. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, E. W. Merwin, on behalf of the plaintiff, (referring to said map marked Exhibit "D" in this case):

Q. "Do you notice the heavy shaded or black lines lying to the west of the dark heavy line, which you say indicated the high tide line, and some parts adjacent to the high tide line on the west coast of that channel? State what that indicates?"

To which ruling of the court the defendants duly excepted.

17. The court erred in overruling the objection of the defendants to the following questions propounded to the witness, E. W. Merwin, on behalf of the plaintiffs, (referring to said map, Exhibit "D," in this case):

Q. "Do you know what is indicated by the dotted line in the channel immediately east of the high tide line?"

Q. "What is it?"

To which rulings of the court the defendants duly excepted.

17a. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the photograph marked Exhibit "L" in this case.

322 To which ruling of the court the defendants duly excepted.

18. The court erred in overruling the objections of the defend-

ants to the testimony of the witness, D. E. Hughes, on behalf of the plaintiffs, relating to the photographs, testified to by said witness as having been taken in the late summer or early fall of the year 1908, and to the introduction in evidence of said photographs, being the photographs marked respectively Exhibits "O," "P," "Q" and "R," in case No. 65230.

To which rulings of the court the defendants duly excepted.

19. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs, of the map marked Exhibit "N" in this case, (copy whereof is found on page 21, of said Book of Maps).

To which ruling of the court the defendants duly excepted.

20. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs, of the map marked Exhibit "O" in this case, (copy whereof is found on page 22, of said Book of Maps).

To which ruling of the court the defendants duly excepted.

21. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs, of the map marked Exhibit "P" in this case, (copy whereof is found on page 23, of said Book of Maps).

To which ruling of the court the defendants duly excepted.

22. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs, of the map marked Exhibit "Q" in this case, (copy whereof is found on page 24, of said Book of Maps).

To which ruling of the court the defendants duly excepted.

23. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the statistics relating to the number of vessels incoming and outgoing, for the year 1871, and other years, at the Port of Wilmington, or Port of San Pedro, and to the amount and character of freight carried by such vessels.

To which ruling of the court the defendants duly excepted.

24. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the report of W. S. Marshall, Chief Engineer of the United States Army, of the War Department, recommending the appropriating of money to dredge the entrance to San Pedro inner harbor and channel to a depth of 30 feet below zero.

324 To which ruling of the court the defendants duly excepted.

25. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the map marked Exhibit "M" in this case, (a copy whereof is found on page 16 of said Book of Maps).

To which ruling of the court the defendants duly excepted.

26. The court erred in sustaining the objection of the plaintiffs to the introduction in evidence on behalf of the defendants of the order made by the Surveyor General referring to the District Court, the contest by James McFadden, of the application by Phineas Banning to purchase the lands in controversy in this suit, made and

entered February 20th, 1878, and of the judgment roll in the action of James McFadden vs. Phineas Banning, et al., No. 4434, in the District Court, of the 17th Judicial District, commenced and prosecuted pursuant to said order of reference.

To which ruling of the court the defendants duly excepted.

27. The court erred in sustaining the objection of the plaintiffs to the introduction in evidence on behalf of the defendants of the trust deed executed by the defendant, Pacific Electric Railway Company, to the Union Trust Company, of San Francisco, covering the interest of said defendants in controversy in this suit, and to the offer of the defendants to show the facts concerning the indebtedness secured by said trust deed.

To which ruling of the court the defendants duly excepted.

28. The court erred in sustaining the objection of the plaintiffs to the introduction in evidence on behalf of the defendants of the trust deed executed by the defendant, Los Angeles Interurban Railway Company, to the Union Trust Company, of San Francisco, covering the interest of said defendant in the land in controversy in this suit, and to the offer of the defendants to prove the facts concerning the indebtedness secured by said trust deed.

To which ruling of the court the defendants duly excepted.

29. The court erred in sustaining the objection of the plaintiffs to the introduction in evidence on behalf of the defendants of the field notes of the survey made by Frank Le Couvrer, on the application of Henry B. Tichenor for the purchase of the lands in controversy in this suit, containing the certificate and affidavit of said Le Couvrer to the effect that all the land embraced in said application to purchase is above the line of low tide.

To which ruling of the Court the defendants duly excepted.

30. The court erred in sustaining the objection of the plaintiffs to the offer of the defendants to prove by the witness, E. T. Wright, that in his judgment Phineas Banning would have paid to the County Surveyor at least \$241 for the survey made by Mr. Hanson while he was County Surveyor, of tide land location No. 57, in 1866.

To which ruling of the court the defendants duly excepted.

31. The court erred in sustaining the objection of the plaintiffs to the same offer of the defendants, as stated in the last preceding specification, with respect to the survey made by County Surveyor T. J. Ellis, in relation to the same tide land location No. 57.

To which ruling of the court the defendants duly excepted.

32. The court erred in sustaining the objection of the plaintiffs to the following question propounded to the witness, Louis Wilhelm, on behalf of the defendants, (referring to the land farmed by said witness and testified to by him as being identical with the filled in land at Wilmington):

Q. "What can you grow on such land, or what have you seen growing, of your own observation?"

To which ruling of the court the defendants duly excepted.

33. The court erred in sustaining the objection of the plaintiffs

327 to the offer of the defendants to prove that the witness, Louis Wilhelm, has raised various vegetable products on land filled in from the salt water, that is substantially the same in character as the land in controversy in this case, and that the land throughout tide land location No. 57 is of the same character to that testified to by the witnesses, Mr. and Mrs. Powers; and that the land filled in on said tide land location is the same substantially in character, and will, if farmed, raise and produce the same products as said land farmed by the witness, Wilhelm.

To which ruling of the court the defendants duly excepted.

33a. The court erred in sustaining the objection of the plaintiffs to the following question propounded to the witness, George Dart, on behalf of the defendants:

Q. "These lands that have been reclaimed in Nova Scotia for agricultural purposes, how do they compare with farming lands upon the dike, or the uplands, in value?"

To which ruling of the court the defendants duly excepted.

34 The court erred in sustaining the objections of the plaintiffs to the following questions, propounded to the witness, C. G. Keyes, on behalf of the defendants, (referring to the territory embraced in the boundaries of the town of Wilmington as proposed to be

328 incorporated by the Act of the Legislature, approved February 27th, 1872):

Q. "State how that territory was treated by the county of Los Angeles, with respect to government, prior to the incorporation of the present city of Wilmington, which was effected on or about December 26th, 1905."

Q. "State whether the county had charge of the roads within that town, while you lived there, or within that territory prior to the present incorporation of the city of Wilmington."

To each of which rulings of the court the defendants duly excepted.

35. The court erred in overruling the objections of the defendants to the following question propounded to the witness, Homer Hamlin, on behalf of the plaintiffs:

Q. "I will ask you to state whether in your opinion, if the waters of the Bay of Wilmington were excluded from those portions of the bay which lie below high tide, ordinary high tide; if said portions would be capable of producing crops or vegetation of a horticultural or agricultural character."

To which ruling of the court the defendants duly excepted.

36. The court erred in overruling the objections of the defendants to the following question propounded to the witness, Homer Hamlin, on behalf of the plaintiffs:

329 Q. "I will ask you to state whether or not in your opinion after that land was diked with dikes thrown upon the surface, whether the waters of the bay would be excluded from said lands below the line of ordinary high tide."

To which ruling of the court the defendants duly excepted.

37. The court erred in overruling the objection of the defendants to the introduction in evidence on behalf of the plaintiffs of the

photographs testified to by the witness, Homer Hamlin, as having been taken on October 12, 1909.

To which ruling of the court the defendants duly excepted.

38. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, William Mulholland, on behalf of the plaintiffs:

Q. "I will ask you to state whether or not in your opinion if the water of the bay should be excluded from the mud flats composing the bottom of the bay, those mud flats would be capable of producing crops and vegetation other than vegetation of a marine character."

To which ruling of the court the defendants duly excepted.

39. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, William Mulholland, on behalf of the plaintiffs:

330 Q. "Assuming that dikes were thrown around the mud flats, those mud flats being below the line of ordinary high water, state whether or not, in your opinion, the water would be excluded from the flats by those dikes.

To which ruling of the court the defendants duly excepted.

40. The court erred in overruling the objection of the defendants to all of the testimony of the witness, William Mulholland, on behalf of the plaintiffs, concerning the exclusion of water from the lands in controversy by the construction of dikes; and to the following question, propounded to said witness, Mulholland:

Q. "And supposing the dike was built of the same character of soil, then the dike itself would be pervious to water?"

To which ruling of the court the defendants duly excepted.

41. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, Lee Phillips, on behalf of the plaintiffs:

Q. "I will ask you if, in your opinion, dikes were thrown around the mud flats of that bay, at the line, or slightly above the line of low tide, and formed of the material of which the bottom of the bay is composed, whether or not such dikes would exclude the tide water from the land lying inside of the dikes and in the bed of the tract?"

To which ruling of the court the defendants duly excepted.

331 42. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, Lee Phillips, on behalf of the plaintiffs: (referring to levees or dikes, which might be constructed upon the lands in controversy):

Q. "In your opinion would there be any subsurface seepage there below the line of the levee? Below the dike itself?"

To which ruling of the court the defendants duly excepted.

43. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, Lee Phillips, on behalf of the plaintiffs:

Q. "State whether or not, in your opinion, if dikes were constructed around the mud flats, or upon the mud flats of Wilmington Bay, even though the water did not cover the surface of the area inside of the dikes, whether the land inside of those dikes would be capable of producing crops in its natural condition, after the levees were constructed, without any further engineering."

To which ruling of the court the defendants duly excepted.

44. The court erred in sustaining the objection of the plaintiffs to the following question, propounded by the defendants, to the witness, Lee Phillips, on cross examination:

Q. "Assuming there was a large amount of fresh water coming down from the hills and finding its estuary in the tide flats, and they were diked off, would that make any difference, in your opinion, whether they were cultivatable or not?"

To which ruling of the court the defendants duly excepted.

45. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, J. B. Lippincott:

Q. "I will ask you to state whether or not, in your opinion, if the water of the bay was shut off from the mud flats by dikes, those mud flats from which the water was shut off would be capable of producing crops?"

To which ruling of the court the defendants duly excepted.

46. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, J. B. Lippincott, on behalf of the plaintiffs:

Q. "I will ask you to state whether or not, in your opinion, the construction of levees from the material from which the bottom of the bay is composed would effectually exclude water from the mud flats, the bottom of those mud flats being above the line of ordinary high tide."

333 To which ruling of the court the defendants duly excepted.

47. The court erred in overruling the objection of the defendants to the following question propounded to the witness, J. B. Lippincott, on behalf of the plaintiffs:

Q. "What is the effect of the cultivation of lands of that character upon the capillary attraction, if anything, of the lands underneath?"

To which ruling of the court the defendants duly excepted.

48. The court erred in overruling the objection of the defendants to the following question propounded to the witness, J. B. Lippincott, on behalf of the plaintiffs:

Q. "Mr. Lippincott, state by what method, if at all, those lands could be reclaimed."

To which ruling of the court the defendants duly excepted.

49. The court erred in overruling the objection of the defendants to the following question propounded to the witness, J. B. Lippincott, on behalf of the plaintiffs:

Q. "Calling your attention to the channels delineated on Exhibit 'H,' in case No. 64536, and the map marked 'Plaintiffs' Exhibit 'O,' in case No. 64536, and stating in explanation that this line adjoining these channels is marked one foot below zero, zero being the mean of lower low water,—I will ask you to state in what

334 way that would effect the expense of reclamation, assuming that the channels were compelled to be left open."

To which ruling of the court the defendants duly excepted.

50. The court erred in overruling the objection of the defendants

to the following question propounded to the witness, J. B. Lippincott, on behalf of the plaintiffs:

Q. "In your opinion, what sized levees would be required to reclaim lands of that character and to reclaim that particular land, if there was an attempt made to reclaim it by shutting off the water?"

To which ruling of the court the defendants duly excepted.

51. The court erred in overruling the objections of the defendants to the questions propounded by the plaintiffs to the witness, J. B. Lippincott, as to the result of the estimate, testified to by the witness as having been made by him, of the expense of placing dikes of the character described by the witness upon the tide lands in controversy, and keeping the channels open.

To which ruling of the court the defendants duly excepted.

53. The court erred in overruling the objection of the defendants to the following question propounded to the witness, N. A. Breen, on behalf of the plaintiffs:

335 Q. "I will ask you, from your experience as a farmer, and your observation, to state whether or not, in your opinion, the soil of the earth in which these mud flats (referring to the lands in controversy), is composed, would, if dikes were thrown around them, and the water kept out of them, be capable of producing vegetation."

To which ruling of the court the defendants duly excepted.

54. The court erred in overruling the objection of the defendants to the following question propounded to the witness, Oliver McCoy, on behalf of the plaintiffs:

Q. "How does the soil of the mud flats of Wilmington Bay, or the earth which composes them, compare with the soil of the flat land that extends up northeast of Wilmington, and in the locality where you state you farmed and observed others farm years ago?"

To which ruling of the court the defendants duly excepted.

55. The court erred in overruling the objection of the defendants to the following question propounded to the witness, John Biddle, on behalf of the plaintiffs:

"Q. Basing your answer upon your experience in harbor work, is the area of the harbor lines of such a character as may be improved into a harbor, having water of sufficient depth for seagoing vessels?" (Meaning the territory outside of the harbor lines.)

336 To which ruling of the court defendants duly excepted.

56. The court erred in overruling the objection of the defendants to the following question propounded to the witness, John Biddle, on behalf of the plaintiffs:

"Q. In what way may the inner harbor of San Pedro be developed and improved?" (Meaning the territory seaward or outside of the harbor lines.)

To which ruling of the court defendants duly excepted.

57. The court erred in overruling the objection of the defendants to the following question propounded to the witness, John Biddle, on behalf of the plaintiffs:

"Q. Basing your answer upon your knowledge of harbor develop-

ment, in your judgment will the construction of slips, landward from the harbor lines, be feasible?"

To which ruling of the court defendants duly excepted.

58. The court erred in overruling the objection of the defendants to the following question propounded to the witness, John Biddle, on behalf of the plaintiffs:

"Q. And in your opinion, would that be the proper method of harbor development?"

Mary A. Banning, Lucy T. Greenleaf, Mace Greenleaf, Los Angeles Harbor Improvement Company and Imperial Investment Company, in addition to the foregoing statements on 337 motion for new trial, specification of insufficiency of evidence, errors of law, and the particulars in which the decision is against law, proposed on behalf of all the defendants herein, now propose the following supplement or addition to the said statement on their own behalf, which supplement is to be deemed a part of said statement on the motion for a new trial insofar as the motion on behalf of these defendants first above named are concerned, in accordance with the stipulation of the parties hereto that such supplement might be proposed on their behalf, as follows:

On the trial of this cause there was offered and received in evidence a purported lease executed by the city of Wilmington, a municipal corporation within the boundaries of which the lots described in said lease are situated, of date the 11th day of April, 1907, and the same was executed and delivered to the defendant herein, the Imperial Investment Company, by the proper officers of the said city of Wilmington, and the same was executed by them pursuant to a resolution of its board of trustees adopted at a lawful meeting of said board of trustees, and purporting to authorize the execution of the same, a copy of which said lease was marked "Defendant's Exhibit 13," and is as follows:

"This agreement, made and entered into in duplicate this 338 11th day of April, 1907, by and between the City of Wilmington, a municipal corporation of the sixth class, organized and existing under and by virtue of the laws of the state of California, the party of the first part, and the Imperial Investment Company, a corporation organized and existing under the laws of the state of California, the party of the second part:

"Witnesseth: Whereas said party of the first part as such municipal corporation is vested with the power and authority to improve the water front of said city and to control and manage the same, which said water front is now undeveloped and unimproved;

"And whereas said party of the second part is the owner of the easterly ten acres of lot L of a partition of the Rancho Los Palos Verdes, as partitioned in case No. 2372, District Court, which said lot is within the boundaries of said city of Wilmington, and along the water front thereof, which said lot said party of the second part desires to make accessible to deep water by the construction of a channel through the Inner Harbor of the bay south of the city of Wilmington, and in the performance of said work desires also to fill

and reclaim certain other portions of the water front of said city, hereinafter described, which said work will greatly improve said harbor and will be of great benefit to said city;

339 "Now therefore, in consideration of the premises and of the faithful performance of the promises and agreements herein contained, it is mutually agreed as follows, to wit:

"1. Said party of the second part agrees that it will within ten days from and after the execution of this agreement apply to the United States secretary of war for permission to dredge a channel in the Inner Harbor San Pedro, California, at least one hundred feet wide and twenty feet deep, commencing at a point in the Government Turning Basin, as shown on the map hereto attached, thence following the channel of navigable water in the West Basin of said Inner Harbor in a northwesterly direction about twenty-five hundred feet to the proposed pierhead line, as indicated on the map prepared by Captain Amos A. Fries, corps of engineers, U. S. A. which accompanied his report dated February 21, 1907, and designated as 'Inner Harbor San Pedro Showing Central Basin Plan' and marked exhibit No. 1, of which the attached map is a true copy of the West Basin portion; thence northerly and northwesterly along said pierhead line as proposed, or as it may be established, about forty-six hundred fifty feet to the southerly line of said lot L of a partition of the Rancho Los Palos Verdes; and that within six months after receiving permission from the War Department to do said work, it will commence the same and in connection therewith it will construct a bulkhead wherever necessary, of such dimensions as may be permitted or required by the United States engineer in charge of the Los Angeles District of the War Department, along the lines indicated by said engineer between the line of said channel and the west shore line of said West Basin, and that it will fill and reclaim the land between said channel and said westerly shore line of said West Basin up to the line of high water, and that it will construct in, through and upon said lands so reclaimed such slips as may be necessary, all at its own cost and expense.

"2. That it will do all dredging necessary in the navigable waters of said Inner Harbor to make said channel of the dimensions above stated, and to make all slips aforesaid of the proper size, using the material obtained as the result of such dredging to fill in and reclaim the area between the bulkhead and shore line above referred to; and in addition thereto said party of the second part agrees that during the work of dredging said channel it will also, if then requested so to do by said party of the first part, fill in and reclaim to the harbor line on the north side of said West Basin any of the streets of said city of Wilmington which said party of the first part may then indicate; and in addition thereto, said party of the second part further agrees that if said party of the first part then desires to extend West street and L street in said city to the harbor line as indicated on said map, it will extend the channel so constructed by it to the pierhead line at the foot of said streets when permitted so to do by the War Department, all at

the cost and expense of said party of the second part; it being expressly understood and agreed that said party of the second part shall in no event acquire any right or title hereunder in or to such streets or such adjoining property as may be reclaimed by it and extended to the proposed harbor line on the northerly side of said West Basin.

"3. Said party of the first part hereby consents to the dredging of said channel and the performance of the work aforesaid and to the maintenance thereon by said party of the second part of such slips as it may construct; and said party of the first part, for and in consideration of the performance of the work aforesaid, in accordance with this agreement, does hereby lease, demise and let to said party of the second part, its successors and assigns, for the term of fifty years from and after the date of this agreement and lease, the lands and premises so reclaimed by it, lying between the proposed channel as indicated on the accompanying map and as hereinbefore described and the westerly shore line of said West Basin, the exterior boundaries of which said land so to be reclaimed are described as follows,

to wit: Commencing at a point on the southerly line of said
 342 lot L, where the westerly pierhead line as shown on said map if projected would intersect the southerly line of said lot L; thence southeasterly along said westerly pierhead line fifteen hundred feet, more or less, to a point; thence southerly twenty-three hundred feet, more or less, along said pierhead line to a point; thence south-westerly eight hundred fifty feet, more or less, to a point, being the easterly end of the south line of what is marked on the attached map as "Slip No. 1," thence westerly one thousand feet, more or less, along the south line of said Slip No. 1 to the line of high water on the westerly shore of said West Basin, where the southerly line of said Slip No. 1 if projected would intersect with said shore line; thence meandering in a general northerly direction along said westerly shore line at high water to the point of beginning; provided, however, that said party of the first part reserves the right for two streets across said property, each of a width of one hundred feet, from the San Pedro road by the most direct route to said proposed pierhead line, to be reserved from the operation and effect of this lease, to be at least one thousand feet apart, and at such points across said property as may be hereafter agreed upon between the parties hereto; provided, said party of the first part requests the opening of said streets within thirty days after the completion of said work, save and
 343 excepting of and from the terms and conditions and provisions of this contract and lease any and all property rights and privileges that may be owned or possessed by any private persons or corporation unless the party of the second part shall acquire such property or rights; provided further that this agreement and lease and all right, title and interest of the said party of the second part in and to said property and every part thereof shall cease and determine and end absolutely if said party of the second part shall fail, neglect or refuse to commence said work within six months from the time permission is granted therefor by the War Department as aforesaid or if permission should be finally refused

by the War Department, or if it shall fail to complete said channel along the lines indicated, or such other lines as may be designated by the War Department, within twenty-four months after commencing work as aforesaid; provided further, that if any change is required in the lines of said proposed channel or in the harbor lines as indicated on the map hereinbefore referred to, then the foregoing lease will apply to said change and will include the property and premises between the lines as thus established and the westerly shore line of said West Basin, and the foregoing lease will be re-executed as charged so as to correctly describe said lands, if the same becomes necessary or advisable in the opinion of said party of the second part; provided, further, that should said party of the second part be obstructed or delayed in the prosecution or completion of said work by any act of said party of the first part, or by any destruction of its work or damage thereto by the elements or by the abandonment of the work by its employees through no default on its part, or by any litigation or unavoidable delay, then the time herein fixed for the commencement of work of the completion of said channel shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; provided, however, that in the event of litigation as aforesaid, said party of the first part may have the right and privilege at its own cost and expense of appearing in any suit or action brought and taking any proceedings that it may deem necessary or advisable for the purpose of bringing the issues involved in said litigation to a speedy hearing before the court in which the same is pending.

"In witness whereof, the party of the first part has caused these presents to be executed in its name by the president of the board of trustees of said city of Wilmington, and the clerk of said city, with the corporate seal attached, in pursuance of a resolution of its board of trustees duly adopted at a regular meeting thereof the day and year first above written; and said party of the second part has caused these presents to be executed in its corporate name by its president and secretary, with its corporate seal attached, in pursuance of a resolution of its board of directors, all in duplicate the day and year first above written.

CITY OF WILMINGTON,

[SEAL.]

By H. E. GANNAWAY,

President of the Board of Trustees.

Attest:

D. R. WOODS, *Clerk.*

IMPERIAL INVESTMENT COMPANY,

By H. C. OAKLEY, *President.*

Attest:

[SEAL.] A. H. KEMPER, *Secretary.*"

It is stipulated that this lease and whatever rights passed thereunder are now invested in the defendants, the Imperial Investment Company, the Los Angeles Harbor Company, Mary H. Banning, and Lucy T. Greenleaf in the proportional interest fixed by certain contracts existing between them.

It was also shown on behalf of said defendants that, after the execution of the said lease, the defendant, Los Angeles Harbor Company, under the said lease and in behalf of said defendants interested therein and in due time, commenced the dredging of channels through and adjoining the leased premises, and did also commence the erection of bulkheads by the driving of piles, and prior to the time of the commencement of this suit had expended in that behalf approximately twelve thousand (12,000) dollars, and said
346 work was done and said expenditures made by it, claiming the right to do so under the said lease and in the performance of the requirements thereof. No evidence was offered on behalf of plaintiff.

And this was substantially all of the evidence relating to the said lease.

And these defendants, in addition to the specifications proposed on its behalf on the statement of motion for a new trial herein, also specified the following particulars in which the evidence is not sufficient to support the findings of the court herein:

1. That the evidence is not sufficient to support the finding that all the property described in the second paragraph of the findings herein lies below the line of ordinary high tide, nor the finding to the same effect in the third paragraph of said findings that said land lies, and always has been, below the line of ordinary high tide of said bay; but on the contrary, the evidence shows that a large part of the said property is, and always has been, above the line of ordinary high tide.

2. The evidence is insufficient to support the facts found in the tenth paragraph of the findings, to the effect that the lease from the city of Wilmington to the Imperial Investment Company is invalid, inoperative or void, or that the city of Wilmington did not by the said instrument lease the said lands to the said Imperial In-
347 vestment Company.

The foregoing statement, having been duly served and presented for settlement within the time allowed by law and the stipulation of the parties, is now proposed as a statement of the case on motion for new trial on behalf of all and each of the defendants hereunder named.

GIBSON, TRASK, DUNN & CRUTCHER,
J. W. McKINLEY,
FRANK KARR,

Attorneys for Defendants Banning Company, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company, a Corporation.

LLOYD W. MOULTRIE,
Attorney for Defendants Los Angeles Harbor Company and Imperial Investment Company.

WARD CHAPMAN,
Attorney for Defendants Mary H. Banning, Lucy T. Greenleaf and Mace E. Greenleaf.

Due service of the foregoing proposed statement of the case on motion for new trial, is acknowledged this 1 day of May, 1911.

U. S. WEBB, *Att'y Gen'l.*
ANDERSON & ANDERSON ET AL.,
Attorneys for Plaintiffs.

It is hereby stipulated, that the foregoing engrossed copy of bill of exceptions is correct in every particular and that the same
348 may be settled and allowed by the court as here presented.

Dated, May 17th, 1911.

U. S. WEBB, *Att'y Gen'l by A.,*
ANDERSON & ANDERSON ET AL.,
Attorneys for Plaintiff.

GIBSON, TRASK, DUNN &
CRUTCHER

WARD CHAPMAN,
LLOYD MOULTRIE,
J. W. McKINLEY,
FRANK KARR,

Attorneys for Defendant.

The foregoing bill of exceptions is hereby settled and allowed as correct.

Dated, July 5th, 1911.

WALTER BORDWELL,
Judge.

Endorsed: Filed Jul. 5, 1911. H. J. Lelande, clerk; by Geo. O. Monroe, deputy.

Minutes Superior Court, Dept. 9.

July 10, 1911.

Order Denying Motion for New Trial.

(Title of Cause.)

The defendants having moved the court for new trial upon the grounds stated in their notice of intentions now on file, and the
349 court having considered the same, it is ordered that defendant's motion for new trial be and the same is hereby denied.

[Title Court and Cause.]

Notice of Appeal.

To the Clerk of the Superior Court and to U. S. Webb, Attorney General; Messrs. Anderson & Anderson, A. P. Fleming, Esq., Leslie R. Hewitt, Esq., and John W. Shenk, Esq., Attorneys for Plaintiffs:

Please take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the state of California from the judgment made and entered in the above entitled action on the 23rd day of February, 1911, in favor of the plaintiffs and against the said defendants, and from the whole thereof, and from the order denying defendants' motion for a new trial made and entered herein on the 10th day of July, 1911.

Dated this 15th day of August, 1911.

J. W. McKINLEY,
FRANK KARR,
GIBSON, DUNN & CRUTCHER,
*Attorneys for Defendants Banning Com-
pany, Mary H. Norris, Hancock Ban-
ning & Pacific Electric Railway
Company.*

WARD CHAPMAN,
*Attorney for Defendants Mary H. Ban-
ning, Lucy T. Greenleaf and Mace
Greenleaf.*

LLYOD W. MOULTRIE,
*Attorney for Defendants Los Angeles
Harbor Company and Imperial Invest-
ment Company.*

350 Received copy of the foregoing notice this 16 day of Au-
gust, 1911.

U. S. WEBB,
ANDERSON & ANDERSON,
JOHN W. SHENK,
LESLIE R. HEWITT,
A. P. FLEMING,

Attorneys for Plaintiffs.

Endorsed: Filed Aug. 16, 1911. H. J. Lelande, clerk; by J. F. Devin, deputy.

Clerk's Certificate.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, H. J. Lelande, county clerk and ex-officio clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in the above entitled action now on file in my office, and that the same contains

full, true and correct copies of the judgment roll, statement on motion for new trial, order denying motion for new trial, and notice of appeal, together with the endorsements on said papers and documents, as the same now appear on file in my office.

I further certify that an undertaking on appeal by the defendants from the judgment and from the order denying the motion for new trial, in due form, has been duly waived.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court, this — day of September, 1911.

H. J. LELANDE, *Clerk.*

By — — —, *Deputy.*

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[Title of Court and Cause.]

Stipulation.

It is hereby stipulated and agreed by and between the respective counsel for plaintiffs and defendants in the above entitled action, that the foregoing printed transcript on appeal is correct and contains full, true and correct copies of the judgment roll, statement on motion for new trial, order denying motion for new trial and notice of appeal, together with the endorsements on said papers and documents, all of which papers and documents are a part of the files and records of the Superior Court.

And it is further stipulated that an undertaking on appeal by the defendants from the judgment and from the order denying the motion for new trial in due form, has been duly waived.

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Dated this — day of September, 1911.

J. W. McKINLEY,

FRANK KARR,

*Attorneys for Defendants and Appellants
So. Pac. R. R. Co., So. Pac. Co. and
Homer S. King.*

GIBSON, DUNN & CRUTCHER,

*Attorneys for Defendants and Appellants
Banning Company, Mary H. Norris,
Hancock Banning & Pacific Electric
Railway Company.*

WARD CHAPMAN,

*Attorneys for Defendants and Appellants
Mary H. Banning, Lucy T. Greenleaf,
Mace Greenleaf.*

LLOYD W. MOULTRIE,

*Attorney for Defendants and Appellants
Los Angeles Harbor Company and Im-
perial Investment Company.*

U. S. WEBB, *Attorney General;*

ANDERSON & ANDERSON,

LESLIE R. HEWITT,

JOHN W. SHENK,

A. P. FLEMING,

Attorneys for Plaintiffs and Respondents.

353-355 Received copy of the within for the judge who tried the case, this — day of September, A. D. 1911.

H. J. LELANDE,
County Clerk.

By — — — — —,
Deputy Clerk.

Due service of the within, and receipt of a copy hereof, is hereby admitted this — day of September, A. D. 1911.

— — — — —,
— — — — —,
Attorneys for Respondent.

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L. A. No. 3060. In Bank.

December 20, 1913.

THE PEOPLE OF THE STATE OF CALIFORNIA, on Information of Attorney-General, Plaintiff vs. Respondent,

v.

CALIFORNIA FISH COMPANY, CRESCENT WHARF AND WAREHOUSE Co. and Southern California Lumber Company, Defendants and Appellants.

[1] Tide lands—Sovereignty of State—Trust for Navigation and Fishery.—Lands lying between the lines of ordinary high and low tide, as well as that within a bay or harbor and permanently covered by its waters, belong to the state in its sovereign character and are held in trust for the public purposes of navigation and fishery.

[2] Id.—Alienation in Fee to Private Parties—When Permissible—Land Cut Off and Unavailable for Navigation.—In the administration of this trust when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of such tide lands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded

lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use.

[3] Id.—Id.—Id.—Id.—Exclusion of Tide Lands From Navigation—Conclusiveness of Determination Upon Courts.—When the state, in the exercise of its discretion as trustee, has decided that portions of the tide land should be thus excluded from navigation and sold to private use, its determination is conclusive upon the courts, but statutes purporting to authorize an abandonment of such public use will be carefully scanned to ascertain whether or not such was the legislative intention.

[4] Id.—Patent for Tide Lands—Title of Patentee—Soil Subject to Public Rights of Navigation and Fishery.—The holder of a patent to tide lands has only the naked legal title subject to the

right of the state to take and use the same at any time that it decides that interests of commerce and navigation or the fisheries may require such use.

[5] Id.—Sale of Tide Lands—Constitutional Limitation.—Section 2 of article XV of the constitution deprives the legislature of power to dispose of the tide lands fronting upon navigable waters so as to entitle the grantee to destroy or interfere with the public easement for navigation, and to that extent repeals all laws which theretofore may have purported to authorize such alienation.

[6] Id.—Id.—Code Sections Authorizing Sale—Effect of.—Sections 3440 to 3493½, inclusive, of the Political Code authorizing the sale of swamp and tide lands do not authorize a sale which destroys the public easement of navigation and fishery.

[7] Id.—Id.—Purpose of Code Sections.—The provisions of the Political Code were enacted without any consideration of the interest or necessities of navigation over tide lands, and were not intended as an exercise of the power of administering the public trust upon which the state holds such lands, but simply authorize the sale of such lands subject to the public easements.

[8] Id.—Statutory Construction—Limitation of Power of State.—A statute will not be construed to impair or limit the sovereign power of the state to act in its governmental capacity and perform its governmental functions in behalf of the public in general, unless such intent clearly appears.

[9] Id.—Establishment of Line for Seawall—Effect of.—The mere establishment of a seawall line has no effect upon the character of the waters and tide lands between it and the shore as property devoted to public use for navigation, at least until some further action is taken looking to the erection of the wall or the abandonment of the public use of the waters between it and the shore.

[10] Id.—Lands Below Low Tide—Sale Unauthorized—Void Patent.—The tide land laws do not authorize a sale of land below low tide in any case, and a patent thereto conveys no title whatever.

[11] Id.—Validation of Patents for Lands Uncovered by Recession or Drainage of Inland Lakes—Construction of Statute—Tide Lands not Included.—Titles to tide lands are not validated and confirmed by section 8 of the act of 1893 now incorporated into the Political Code as section 3493s, providing that all uncanceled certificates and patents for swamp and overflow lands belonging to any of the classes described in section 3493m, are for all purposes valid, as such statute does not apply to tide lands.

[12] Id.—Id.—Id.—Applicability of Statute to Swamp Lands.—Such act as regard to swamp lands applies only to unsegregated lands for which patents or certificates may have been issued.

[13] Id.—Tide Lands Purchased from State—Claim of Title—State not Estopped.—The state is not estopped from claiming title to tide lands purchased from it, by the mere payment of the money without an offer to return it.

358 [14] Id.—Tide Lands Within Two Miles of Incorporated Town—Filing of Application Previous to Repeal of Incorporating Act—Subsequent Acceptance—Effect of.—A patent to tide

lands within two miles of the limits of an incorporated town is not rendered invalid by reason of the fact that the application to purchase was filed three days before the repeal of the act incorporating the town, where the approval is made thereafter.

[15] *Id.*—Municipal Corporations—Town of Wilmington—Incorporated Town.—The town of Wilmington from the date of the incorporating act of February 20, 1872, until its repeal on March 12, 1887, was an incorporated town within the meaning of section 3 of article 15 of the constitution withholding from grant or sale all tide lands within two miles of any incorporated city or town fronting on the waters of any bay used for the purposes of navigation, and patents to such tide lands issued between such dates are void.

[16] *Id.*—*Id.*—Incorporation of Municipality—Power of Legislature—Consent of Inhabitants Unnecessary.—The legislature has power to incorporate territory as a municipal corporation without the consent or the acceptance of the inhabitants thereof.

[17] *Id.*—Contest to Purchase Tide Lands—Judgment—State not Estopped.—The state is not estopped from claiming title to tide lands by a judgment in a contest between opposing claimants to purchase the land.

[18] *Id.*—Patent to Tide Lands Within Two Miles of Incorporated Town—Issuance After Repeal of Incorporating Act—Approval of Application Prior to Repeal—Void Patent.—A patent to tide lands within two miles of an incorporated town issued after the repeal of the incorporating act, is not valid, where the application was affirmed prior to such repeal.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellants—Gibson, Dunn & Crutcher and Sheldon Borden; J. W. McKinley, Frank Karr, Ward Chapman, Edward E. Bacon and W. R. Millar, of Counsel.

For Respondents—U. S. Webb, Attorney-General; Leslie R. Hewitt, John W. Shenk, A. P. Fleming and Anderson & Anderson.

Amici Curiae for Appellants—John Jewett Earle, Edward W. Engs and Titus, Creed & Dall.

The defendants appeal from the judgment and from an order denying their motion for a new trial.

This is one of a series of nine cases begun by the state of California to quiet its title to certain lands embraced in state patents executed to the predecessors in interest of the defendants, under the general statutes authorizing the sale of swamp and overflowed, salt-marsh and tide lands. The lands lie in and adjacent to the bay of San Pedro, also known as Wilmington bay. The other cases are numbered, respectively, on our Los Angeles register, as No. 3056, No. 3057, No. 3058, No. 3059, No. 3061, No. 3077, No. 3078 and No. 3079. All of these cases were submitted at the same time. The tracts involved in the series of cases, except one, were sold as tide lands. The one exception involves the land embraced in No. 3077,

and was sold as swamp land. We take up the present case, which involves tide land location 132 alone, because it presents the two main questions upon which all of the cases depend, and is free from other questions of importance which may be better treated in connection with the particular case in which they arise. Our discussion and conclusions upon these two principal questions will apply to and control all of the cases. It is conceded that San Pedro bay is and always has been navigable waters of this state and of the United States. The application and survey for tide land location 132 was approved on April 21, 1886, payment was made in full on May 4, 1886, the certificate was issued on that day, and a patent was issued on May 31, 1887, to Merick Reynolds, under whom the defendants claim title.

The land has been occupied by the parties defendant and others in privity with them under wharf franchises, and improvements for purposes of navigation have been made thereon in pursuance of said franchises. Those franchises and improvements, by stipulation of the parties, were withdrawn from consideration and were not adjudicated by the court below. Whatever rights the parties may have thereto will remain unaffected by our judgment on the appeals. The superior court gave judgment for the plaintiff, declaring the Reynolds patent void and that the defendants have no interest in the land under it. The tract is all below the line of ordinary high tide.

In speaking of the tide lands in controversy, we are to be understood as referring only to the land lying between the ordinary high and low tide lines. Some of the land involved in some of the cases is submerged land, below the line of ordinary low tide.

The two principal questions mentioned are, first, the effect of a patent issued under the provisions of the Political Code for the sale of swamp and overflowed, salt-marsh and tide lands, upon the public easement for navigation and fishery and upon the title of the state to the soil; second, the effect of the act of February 20, 1872, purporting to create the town of Wilmington, to bring into operation certain statutory and constitutional provisions reserving swamp and tide lands from sale.

1. The effect of a patent for tide lands.

These patents were issued under and in pursuance of the laws of the state of California providing for the sale by the state of swamp and overflowed, salt-marsh and tide lands, being article II, chapter 1, title VIII, part III, of the Political Code, embracing sections 3440 to 3493½, inclusive. It is admitted on behalf of plaintiff that the proceedings leading up to and including the issuance of these patents were regular in form and according to the provisions of the law above mentioned in force at the time. The plaintiff claims that the patents to the lands sold as tide lands are invalid because the land is not and never has been suitable for agriculture, or reclaimable for agricultural purposes, and either lies wholly under navigable waters, or is covered by the water at ordinary high tide, being of that class of land which the state acquired solely by

virtue of its sovereignty and held in trust for the public uses of navigation and fishery.

[1] It is a well established proposition that the lands lying between the lines of ordinary high and low tide, as well as that within a bay or harbor and permanently covered by its waters, belong to the state in its sovereign character and are held in trust for the public purposes of navigation and fishery. A public easement and servitude exists over these lands for those purposes. In *Martin v. Waddell*, 41 U. S. 410, Chief Justice Taney said: "When the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use." In *Illinois C. Ry. v. Illinois*, 146 U. S. 452, the court defined this trust as follows: "It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties. * * * The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." In *Ward v. Mulford*, 32 Cal. 372, the court said: "Such land is held by the state in trust and for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms upon which she holds them, and of course subject to the public rights above mentioned." (To the same effect see *Eldridge v. Cowell*, 4 Cal. 87; *Guy v. Hermance*, 5 Cal. 74; *Lux v. Haggin*, 69 Cal. 335; *Oakland v. Oakland W. F. Co.*, 118 Cal. 183; *People v. Kerber*, 152 Cal. 733; *Messenger v. Kingsbury*, 158 Cal. 613; *Forestier v. Johnson*, 164 Cal. 30; *Shivley v. Bowlby*, 152 U. S. 29; *United States v. Chandler-Dunbar Co.*, decided by the Supreme Court of United States May 26, 1913, 33 Sup. Ct. Rep. 667.)

[2] It is also settled that in the administration of this trust when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tide lands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use. On this subject in *Illinois C. Ry. v. Illinois*, supra, the court said: "It is grants of parcels of lands under navigable waters, that may afford the foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remain-

ing, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state."

361 (Ward v. Mulford, *supra*; Taylor v. Underhill, 40 Cal. 473; Kimball v. Macpherson, 46 Cal. 107-8; Oakland v. Oakland W. F. Co., *supra*, p. 184; People v. Kerber, *supra*; Messenger v. Kingsbury, *supra*.) The most striking instance of the exercise of this power of the absolute disposition of such tide or submerged lands by the state of California is found in the laws providing for the improvement of the water front of San Francisco. By these laws the water front line was fixed, cutting off from navigation a large area of land which was subject to the daily flux and reflux of the tides and part of the lands always under water, upon which line a seawall was constructed, and the area landward of this wall was subsequently surveyed into lots and streets, sold into private ownership and filled in for private use. This area now constitutes a large portion of the business section of San Francisco. The following cases recognize the authority of the state to make such absolute disposition of these particular lands; Eldridge v. Cowell, *supra*; Guy v. Hermance, *supra*; Hyman v. Read, 13 Cal. 444; Holladay v. Frisbie, 15 Cal. 634; Wheeler v. Miller, 16 Cal. 125; Seabury v. Arthur, 28 Cal. 142; People v. Klumpke, 41 Cal. 277; Knight v. Haight, 51 Cal. 171; Friedman v. Nelson, 53 Cal. 589; Le Roy v. Dunkerly, 54 Cal. 459; Knight v. Roche, 56 Cal. 21; People v. Williams, 64 Cal. 498; San Francisco v. Straut 84 Cal. 124.

In view of these well settled propositions it is obvious that the claim of the plaintiff to the effect that such lands cannot, under any circumstances, be alienated in fee to private parties to the exclusion of the public, cannot be sustained. The main contention of the plaintiff with respect to this and all the other of the series of cases above mentioned, is that the provisions of the Political Code aforesaid, under which the predecessors in interest of the respective defendants obtained such title as the defendants have to the land, were not enacted by the legislature in pursuance of any design to promote, regulate or control navigation, but were a part of the scheme or system designed for the sale of proprietary lands of the state suitable for reclamation and agriculture, and, hence, that these provisions do not authorize the sale into private ownership of tide lands lying upon a navigable bay and suitable for use in furtherance of navigation, or that, if these laws do authorize the sale of the title to the soil of lands of this character, they were not intended to affect the public rights of navigation or fishery and do not give to the patentee anything more than the title to the soil subject to the aforesaid public rights and uses. The defendants contend that these laws were intended to and do authorize the sale of such lands to private use, that they are, in effect, a decision by the state that the tide lands which its officers may thereafter sell under these laws are unnecessary for navigation or fishery, and that the state's decision thus made in regard to this matter is conclusive. The precise task before us, therefore, is to ascertain whether these statutes were designed merely

to authorize the transfer of the title of the soil for such private use as should not interfere with the public rights of navigation and fishery, and subject always to the public use, or whether the intent was to destroy the public use entirely and convey the land in fee.

[4] We had this question under consideration in the recent case of *Forestier v. Johnson*, supra. The plaintiff in that case had purchased from the state, as tide lands, premises embraced in a navigable bay opening into the bay of San Francisco, known as "Fly's Bay". He sued to enjoin the defendants from trespassing thereon by navigating boats over the water for the purpose of hunting and fishing at times when the land was covered with water. The defendants claimed no rights over the land except the right as citizens of the state to exercise the public right of navigation, and while doing so to fish or hunt over the premises. The greater part of the bay was covered and uncovered daily by the tides. The nature of the right asserted by the defendants and their admission as to the title to the soil, made it unnecessary to determine whether or not the patent conveyed such title. The case presented the question whether a patent for tide lands, under these laws, terminated the public right of navigation and fishery over the land embraced therein. It was held that the patent did not terminate these public uses, but merely conveyed to the patentee the title to the soil subject to the public right of navigation and fishery and that the plaintiff was not entitled to enjoin the defendants from exercising these public rights. [5] In this connection the court referred to article XV, section 2, of the constitution, which is as follows: "No individual, partnership or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof." The provisions of the constitution are mandatory and prohibitory. They are binding upon every department of the state government, legislative, executive and judicial. (Art. I, sec. 22.) All previous laws inconsistent therewith ceased to be effective upon the adoption thereof. (Art. XXII, sec. 1.) The effect of the section above quoted is that, no matter what effect a subsequent sale of tide lands may have to pass title to the soil of the tidal lands of a navigable bay such as that of San Pedro or Wilmington, it cannot be effective to give the patentee a right to destroy, obstruct or injuriously affect the public right of navigation in the waters thereof. Since the adoption of that constitution in 1879, if not before, grants of such lands by the state carry, at most, only the title to the soil subject to the public right of navigation. This, of necessity, would save to the state, or its authorized agencies, the right to enter upon such lands and make such erections thereon,

363 or changes therein, as it may find necessary or advisable to adapt the premises for use in navigation and provide access thereto for that purpose, or in furtherance thereof.

The record in these several cases shows that the purchasers of the tide lands, under whom the defendants claim, paid the purchase money for their respective lands after the constitution of 1879 took effect. The earliest payment made was under Tide Land Location No 57, covering land involved in L. A. No. 3057, entitled the People etc. v. Banning Co. et al. The first installment of the purchase money under that location was paid to the state on March 5, 1880. The consequence is, under the authorities about to be cited, that the several purchasers had no vested right in the land, or any enforceable contract against the state for the purchase thereof, at the time the constitution of 1879 took effect. Hence, it follows that, regardless of the question whether the provisions of the Political Code were intended to authorize a sale in fee or not, the sales made under it after the constitution took effect, including those to the predecessors of the defendant, are all impressed with the limitations, reservations and qualifications imposed by the aforesaid provision, and the estates held by the defendants are subject thereto. In *Messenger v. Kingsbury*, supra, p. 615, it is said that "an applicant who has merely filed his affidavit and application to purchase, without paying any part of the purchase price", under the provisions of the Political Code for the sale of tide lands "has no such vested right as will prevent a termination of the opportunity to purchase upon a repeal of the law providing for such sale". (See also *Polk v. Sleeper*, 158 Cal. 634, and cases there cited.) The decision in *Hinekley v. Fowler*, 43 Cal. 63, so far as it announces the rule that the filing of the application creates a contract binding on the state before any part of the price is paid, must be considered as overruled by the later decision. Upon the same principle, such applicant had no such vested right as would prevent the state from altering the conditions of the sale and adding a reservation withholding a part of the estate previously offered, so that the purchaser who thereafter completed a sale, under a previous application but without previous payment, would take the title of the state, subject to such restrictions, limitations, and reservations as the state had determined to insert in the meantime. This principle has often been decided and is thoroughly established by the cases referred to in the opinion in the *Messenger* case. (*Eckart v. Campbell*, 39 Cal. 256; *Johnson v. Squires*, 55 Cal. 103; *Dillon v. Salonde*, 68 Cal. 267; *Urton v. Wilson*, 65 Cal. 11; *Mosely v. Torrence*, 71 Cal. 318; *Manley v. Cunningham*, 72 Cal. 236; *Klauber v. Higgins*, 117 Cal. 451.) The necessary conclusion from these authorities and these facts is that the defendants, as against the state of California, do not hold the entire title and interest in the tide lands, but that their respective estates in such land, if any they have, are each subject to the easement and servitude of the public for purposes of navigation and for commerce by means of navigation, and to the public right of free access to the navigable waters over the frontage, whenever it is necessary for such public purpose.

364 [6] The same conclusion follows from a consideration of the provisions of the Political Code, apart from the effect of the constitution thereon. We so held in *forestier v. Johnson*, supra. Owing to the much greater interests here involved, and the much more elaborate argument in the present cases, we think it proper to treat the subject further. The dates and pages of the official volumes where are found the previous statutes out of which grew the provisions of the Political Code relating to the sale of swamp and overflowed, salt-marsh and tide lands are as follows: Act of April 28, 1855, Stats. 1855, 189; Act of April 21, 1858, Stats. 1858, 198; amending Act of 1859, Stats. 1859, 340; amending and confirming Act of May 14, 1861, Stats. 1861, 363; Act of May 13, 1861, the first provision for reclamation districts, Stats. 1861, 355; Act of April 27, 1863, providing a general scheme for the sale of all state lands, including the swamp and overflowed and all other proprietary lands and also tide lands, Stats. 1863, 591; Act for the reclamation of salt-marsh and tide lands, April 27, 1863, Stats. 1863, 684; revising Act of March 28, 1868, embracing all classes of land belonging to the state, and repealing all other laws on the subject, Stats. 1868, 507; Act of March 27, 1872, legalizing sales and patents of swamp and overflowed, salt-marsh and the tide lands where mistake had been made in designating the class of land, Stats. 1872, 622.

[7] But although the above cited acts show that the sale of tide lands was authorized by the various statutes, enacted after 1859, it is apparent from their provisions that it was not done in the interest of navigation, or with any reference whatever to navigation. The only provision having any tendency to protect or preserve the public easement for navigation, prior to the year 1870, consisted of reservations of lands in and within a specified distance of certain cities, and thereafter and until 1901, of lands within five miles of named cities and within two miles of all other incorporated towns and cities. From and after 1901 the statute reserved tide lands only, within those limits. These reservations, prior to 1901, applied to swamp and overflowed lands as well as tide lands. The purpose of the reservations was not stated in any of the statutes. As they applied, prior to 1901, to both swamp lands and tide lands, the former of which was not held in trust by the state for navigation, but was proprietary land, for the most part far from navigable water, it is clear that even the reservations were not made solely in the interest of navigation.

There has never been any provision regarding navigation in any of these statutes, and no inquiry or determination on the subject, or in reference to it was authorized. No board or officer was given any discretion or authority to ascertain whether any land applied for was or was not required for purposes of navigation, or what effect their reclamation or use for private purposes would have upon navigation and commerce. The surveyor general's approval of the application and survey was necessary. But this requirement applied only to the form of the survey and application and the qualifications of the applicant. It did not

365 empower him to reject the application on the ground that the land was not suitable for cultivation, or that it was needed for navigation, or that its sale to private use would interfere with or destroy the public easement to which such land is dedicated. The applicant determined what land he desired to buy, he caused it to be surveyed if that had not already been done, he made his application and, if he was a person qualified to buy and his proceedings were regular in form, he thereupon became entitled to complete the purchase and could compel the officers of the state to execute the title papers necessary to convey it to him, on payment of the fixed price of one dollar an acre.

The tide lands embraced in these statutes, under the generally accepted meaning of that term, includes the entire sea beach from the Oregon line to Mexico and the shores of every bay, inlet, estuary and navigable streams as far up as tide water goes and until it meets the lands made swampy by the overflow and seepage of fresh water streams. It is not to be assumed that the state, which is bound by the public trust to protect and preserve this public easement and use, should have intentionally abdicated the trust as to all land not within the very limited areas of the reservations, and directed the sale of any and every other part of the land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement, which it was its duty to protect, and for the protection and regulation of which it received its title to such lands.

The history of the legislation on the subject plainly shows that the object of the legislature has been to secure the reclamation of land suitable for agriculture and make it productive. The first statutes, those of 1855 and 1858, with the amendment of 1859, provided only for the sale of swamp lands. These embraced large areas in the interior of the state, situated in the San Joaquin and Sacramento valleys, and extending down to tide water in the bay of San Francisco. There the tide flats in many places merged into them imperceptibly, making it difficult to distinguish between them. The Act of May 13, 1861, was the first law providing for reclamation districts. Section 27 of this act declared that it should apply equally to tide lands and swamp lands. No law at that time authorized the sale of tide lands. The next day, by the Act of May 14, 1861, all sales of tide lands made under the swamp land sale acts were ratified and confirmed, and it was also provided that thereafter any unsold tide land could be purchased under the laws for the sale of swamp and overflowed lands, referring to said acts of 1858 and 1859. The inclusion of tide lands in the laws authorizing the sale of swamp lands, thus appears to have been originally due to the fact that some of that class of land had been inadvertently sold by the officers of the state as swamp land. The reclamation act of 1861 was superseded by the Act of April 27, 1863, Stats. 1863, p. 684, passed on the same day as the aforesaid act for the sale of swamp and tide lands. (Stats. 1863, 591.) Both of these acts classified the tide lands with the swamp lands. Ever since 1863, the acts, including the code, have provided for

the sale of swamp land and tide lands by the same procedure, and have also provided for reclamation thereof by means of public reclamation districts. The act of congress donating the swamp land to the state, declared the purpose to be to enable the state "to construct the necessary levees and drains to reclaim" such lands, and the donation was made because the lands were unfit for cultivation in their natural condition. (9 U. S. Stats. 519.) While it thus appears that the object of the statutes has been the sale of these lands in order that they might be reclaimed and devoted to agriculture, no provision whatever was made for the separation of tide lands fit only for reclamation and agriculture and never covered by waters which could be deemed navigable, from those situated on the shore of navigable bays and rivers and on the sea beaches. This apparent neglect and failure even to mention the paramount interests of navigation shows that there was no intention to deal with that subject or to affect the public easement for that purpose.

[8] There is also a rule of statutory construction leading to the same conclusion. A statute will not be construed to impair or limit the sovereign power of the state to act in its governmental capacity and perform its governmental functions in behalf of the public in general, unless such intent clearly appears. "The state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right against it." (*Mayrhofer v. Board*, 89 Cal. 112.) This case decides that a public school house is not lienable under the mechanics' lien law applying to "property" generally, and without express limitation. For further illustration, it has been held that the state cannot be sued, under section 1050, Code of Civil Procedure, giving a right of action "by one person against another" in certain cases (*Whittaker v. Tuolumne*, 96 Cal. 101); that a school district cannot be garnished as a "person" owing the judgment debtor, under section 542, Code of Civil Procedure. (*Skelly v. School Dist.*, 103 Cal. 655); that a school house is not subject to assessment for street work, although the language of the statute would include its property (*Witter v. School Dist.*, 121 Cal. 351); and that the state is not bound by a statute of limitations purporting to apply "in all cases." (*Russ v. Crichton*, 117 Cal. 695.) In *Oakland v. Oakland W. F. Co.*, *supra*, on page 183, the court says: "The several states hold and own the lands covered by navigable waters within their respective boundaries in their sovereign capacity, and primarily for the purpose of preserving and improving the public rights of navigation and fishery. They have in them a double right, a *jus publicum* and a *jus privatum*. The former pertains to their political power—their sovereign dominion, and cannot be irrevocably alienated or materially impaired. The latter is proprietary and the subject of private ownership, but it is alienable only in strict subordination to the former. No grant of lands covered by navigable waters can be made which will impair the power of a subsequent legislature to regulate the enjoyment of the public right. The grantee takes the mere proprietary inter-

est in the soil, and holds it subject to the public easement".

367 We take it that the court in the last sentence was speaking of grants of tide lands made before the public easement had been discontinued and abandoned by an improvement in the interest of navigation leaving it remote from the water front and useless for navigation. Where a grant of land not thus separated is authorized by statute, and no reference is made to the matter of navigation, under the rule above stated the proper construction of the statute is that it was intended only to dispose of the *jus privatum*, leaving the public easement unimpaired and unaffected, subject to the future control and regulation of the state.

As stated in *Forestier v. Johnson*, *supra*, the decisions heretofore made by this court hold that these statutes do not allow the alienation of tide lands free from the public easement. In *Taylor v. Underhill*, *supra*, the court said that even if the title of the state should pass to the buyer, upon a sale under the Act of 1868, "it would not authorize him to change the water front or obstruct navigation"; that a sale to authorize such change "must be done in the interest of commerce", and, in effect, that the advisability of such change "must first be determined by the legislature"; and that no such right "passes to the purchaser under the laws for the sale of swamp and overflowed land". The only law existing at that time for the sale of tide land was that classing it with swamp and overflowed land. In *People v. Russ*, 132 Cal. 102, the court said, referring to the rights of the owner of lands bought of the state under the provisions of the Political Code under consideration: "The right of the public in the use of a stream, as a public highway, is paramount to any right which the owner of the land has to reclaim his land from overflow." These decisions support our construction.

Other decisions go further and declare that these laws do not apply to tide lands situated on the shores of the ocean between high and low tide lines and that a patent for such land conveys no title to the patentee. (*People v. Morrill*, 26 Cal. 336; *Kimball v. Macpherson*, 46 Cal. 103; *People v. Cowell*, 60 Cal. 400; *Upham v. Hosking*, 62 Cal. 255.) It was upon these decisions that the court below predicated its conclusion that the defendants had no title to the lands in controversy. In view of the very plain language of the statutes describing tide lands among those authorized to be sold, we do not feel that we can follow these decisions. *People v. Morrill*, interpreted the Act of May 14, 1861, in connection with the Act of 1858 as amended by the Act of 1859, applying only to the swamp and overflowed lands. The latter required that the purchaser make oath that the lands were desired for the purpose of "settlement and reclamation by affiant", and other provisions showed that the reclamation was contemplated for agricultural purposes. The Act of May 14, 1861, confirmed sales of tide lands that had been made under the previous statutes and authorized sales thereafter, under the same statutes, of any unsold tide lands. Under these circumstances the court held that only lands suitable for agriculture were included in the authorization and that there

368 was no authority therein for the sale of tide lands on the ocean beach. The subsequent statutes, of 1863 and after, did not require the applicant to make oath that he desired the lands for settlement and reclamation, and their language plainly embraces all tide lands. This decision is therefore scarcely to be considered as authority for the proposition that the subsequent acts did not authorize the sale of the private right in such tide lands. *Kimball v. Macpherson*, and *People v. Cowell*, however, give the same construction to the acts of 1863 and 1868, which, in effect, are the same as the Political Code, holding that they did not authorize the sale of tide lands on the shore of the ocean and not susceptible of reclamation for agricultural purposes. *Upham v. Hosking* approves the previous decisions on this point, but held that the particular sale in question there was validated by the curative Act of 1872, Stats. 1871-2, 587. It involved land in Solano county, which was evidently used for purposes of navigation and commerce only. The reason of the decision is not very clear. Perhaps the curative act was considered as, in effect, a determination by the state that the tide lands which had been applied for up to the date of the act were not necessary for navigation or could be disposed of without detriment to the public easement. These decisions follow the reasoning of the court in *People v. Morrill*, without considering the obvious difference between the provisions of the respective statutes. The idea that the state held a double right, private and public, in these tide lands and that the private right was proprietary, as were the swamp lands with which tide lands were classed, and subject to a similar disposition, and that this disposition might be made subject to the public easement, without injury to the public right, does not seem to have been suggested or considered. No mention is made of the practical difficulty arising from the doctrine declared; that of finding a means of determining where the line should be drawn between the lands authorized to be sold and those not within the legislative intent. The statutes afford no means for such differentiation. If lands on the sea beach alone were to be considered as excluded, there would be no difficulty. But there are vast bodies of land bordering on the bay of San Francisco and other navigable bays and waters in the state with respect to which the doctrine would produce the utmost confusion and uncertainty. Parts of these lands are as incapable of reclamation as the ocean shore. Other parts might be reclaimed, but would obviously be much more useful for navigation, or would be absolutely necessary at the present time for that purpose. Other extensive areas are obviously useless for navigation and indistinguishable from the swamp lands into which they merge. There are all conceivable varieties of conditions. No line of demarcation or classification is given. No distinction can be made which can be applied with certainty to all locations. The courts would be compelled to legislate, or to declare that all tide lands were included in the authority. The only practicable theory is to hold that all tide land is included, but that the public right was not intended to be divested

369 or affected by a sale of tide lands under these general laws relating alike both to swamp land and tide lands. Our opinion is that these decisions should not be wholly followed; that the buyer of land under these statutes receives the title to the soil, the *jus privatum*, subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary. In this way the public right will be preserved and the private right of the purchaser will be given as full effect as the public interests will permit. The purchaser will not obtain the absolute ownership, unless the public authorities, by erecting a sea wall or otherwise improving the premises for navigation, exclude his land or part thereof from the public use and it becomes unnecessary for access or approaches thereto, as in the case of the San Francisco water lots. The public servitude would then be removed from such excluded land.

Our conclusions as to the law on this branch of the case may be summarized as follows:

1. The tide lands are, and from the beginning of our government have been, dedicated to public use for purposes of navigation and fishery.

2. The title to these lands is, by the people, vested in the state in trust for said public uses. The administration and execution of this trust is committed by the constitution to the legislative department, subject to certain expressed reservations and restrictions.

3. The powers of the state as trustee are not expressed. They are commensurate with the duties of the trust. Every trustee has the implied power to do everything necessary to the execution and administration of the trust.

4. As the state has the powers necessary to the execution and administration of the trust, it follows that it may dispose of these lands in the administration of the trust in such manner as the interests of navigation may require. One of the duties of the trust is to adapt the land to the use for navigation in the best manner. If, in so adapting the tide lands for this use, it is found necessary or advisable, in aid of the use, to cut off portions of it from access to navigable water, so that it become unavailable for navigation, the state has power to exclude such portions from the public use and, to that extent, revoke the original dedication.

5. When this has been done in the regular administration of the trust, the land thus excluded from use for navigation may become proprietary land, not subject to the public use, and it may then be alienated irrevocably by the state for private use to private individuals.

[3] 6. When the state, in the exercise of its discretion as trustee, has decided that portions of the tide land should be thus excluded from navigation and sold to private use, its determination is conclusive upon the courts; but statutes purporting to authorize an abandonment of such public use will be carefully scanned to ascertain whether or not such was the legislative intention, 370 and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is

reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.

7. The provisions of the Political Code authorizing the sale of the swamp and tide lands show clearly that they were enacted without any consideration of the interests or necessities of navigation over tide lands, that they were not intended as an exercise of the power of administering the public trust upon which the state holds the tide land, that they were not enacted in pursuance of a legislative determination that such lands were not necessary for navigation, or as a decision that the interests of navigation required that they be excluded from public use, or in the interest of navigation. If they had been so intended, they would authorize the alienation of practically all the tide lands without any provision for the protection of the public use and would result in its utter destruction. They can be given some effect if construed to authorize the sale of such land subject to the public easements, the purchaser to be without authority to interfere with such use, or with the further administration thereof by or on behalf of the state. They are reasonably susceptible of that interpretation; hence they will be so construed. The holder of a patent from the state under these laws will have the naked title to the soil.

8. Section 2 of article XV of the state constitution deprives the legislature of power to dispose of the tide lands fronting upon navigable water so as to entitle the grantee to destroy or interfere with the public easement for navigation. It also to that extent repeals all laws which theretofore may have purported to authorize such alienation. No payment of purchase money to the state for any of the tide land in question was made until after the adoption of the constitution in 1879. Hence it is all subject to the restriction just stated. Therefore, regardless of the question of the true construction of the Political Code provisions purporting to authorize the sale of tide lands, the patents under which the several defendants claim tide lands are subject to the constitutional restriction and do not deprive the state of its power as sovereign trustee to adapt and improve these lands for navigation as it may see fit. This provision, however, does not deprive the legislature of power to improve the water front and irrevocably alienate such tide land as may thereby be rendered inaccessible and useless for navigation.

9. If any part of the tide land in controversy was open to sale when the sales thereof were made, the proper judgment would be that the defendants claiming under such patents own the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for those purposes.

It is to be understood, of course, that if the state has sold tide lands subject to the public easement, prior to making improvements

thereon for navigation, as it may do, it cannot, upon putting in force a plan for the subsequent improvement thereof, retake the absolute title without compensation. The purchaser will continue to hold the servient estate, after as well as before the improvement, and if at any time the public easement and use is lawfully and permanently abandoned, the purchaser will then have the absolute and complete estate in the land. And before any such improvement is made by the state, he may use the property as he sees fit, subject to the power of the state to abate any nuisance he may create thereon, and to remove any purpresture he may erect thereon.

[9] 10. With regard to the harbor lines fixed by the United States, it is clear that this is the equivalent of a license to the state to fill in the land between them and the shore, either before or after the erection of a wall on the established line. And until such a sea-wall is actually made, the state may improve for navigation the space between such established line for the wall and the shore, by wharves or other structures within the line.

It appears that on July 29, 1908, the authorized officers of the United States established in Wilmington bay, otherwise known as the inner harbor of San Pedro, certain lines as pierhead and bulkhead lines for said harbor. A large part of the lands involved lie between these lines and the shore. No seawall, bulkheads, piers, or other improvements have been built on these lines. The defendants claim that the effect of fixing these lines is to divest the public of its easement for navigation over the lands between the lines and the shore, and to release the same to private use. A similar question was presented in *People v. Kerber*, supra, with regard to the seawall line fixed by state authority. The court said: "The establishment of a seawall line has no effect whatever upon the character of the waters and tide lands between it and the shore as property devoted to use for navigation, at least until some further action is taken looking to the erection of the wall or the abandonment of the public use of the waters between it and the shore." (See, also, *People v. Williams*, 64 Cal. 499.) Moreover, the fixing of the bulkhead line, or the erection of a seawall, does not contemplate the discontinuance or vacation of the public use of all the land inside the line or wall. Space within the pierhead line must be reserved for docks and slips, and space inside the wall may be, and usually is, required for wharves, landings and approaches. The harbor lines in this instance were fixed by the United States, which, in case of conflict, is the superior power, so far as interstate or foreign navigation and commerce is concerned. "Although the title to the shore and submerged soil is in the various states and individual owners under them it is always subject to the servitude in respect of navigation created in favor of the federal government by the constitution."

(*Gibson v. United States*, 166 U. S. 272; *Gilman v. Philadelphia*, 70 U. S. 725; *South Carolina v. Georgia*, 93 N. S. 9.)

372 But this paramount power of the United States does not destroy the concurrent and subordinate power and authority of the state to regulate and control tide lands and waters in the interest of navigation. Each state may freely do so, and may fix other

harbor lines differing from those of the federal authority, so long as they do not interfere with the regulations and improvements of the United States made in furtherance of interstate and foreign commerce. (*Gibbons v. Ogden*, 22 U. S. [9 Wheat.] 204.) For the present, therefore, and until the federal authority interferes, the state has the same interest in these lands, and the same power over them, as if the harbor lines had not been fixed by federal authority. The defendants have no right to interfere with this power, or to curtail it, on the ground that the United States may do so in the future.

[10] One of the patents in another of the series of cases (L. A. No. 3057) being tide land location No. 57, includes within its lines a part of the channel leading up to the old Wilmington wharf and embracing land which is and always has been submerged. As we are considering here the main questions involved in all the cases, it is proper to say that the tide land laws do not authorize a sale of land below low tide in any case. So far as such patent, or any other of the patents embrace such land, they convey no title whatever, the officers who executed them being without power under these statutes to sell or convey lands of that character.

[11] The defendants also claim that their titles are validated and confirmed by section 8 of the act of 1893, now incorporated into the Political Code as section 3493s, to the effect that all uncanceled certificates and patents for swamp and overflowed lands, belonging to any of the classes described in section one of the act (sec. 3493m, Pol. Code) are for all purposes valid. We do not think this statute, either as originally enacted (Stats. 1893, 341), or as incorporated in the code, applies to tide land. The description given in the first section is as follows: "lands uncovered by the recession or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty, or the swamp and overflowed lands not segregated by the United States." The title of the original act was, "an act regulating the sale of the lands uncovered by the recession or drainage of the waters of inland lakes, and unsegregated swamp and overflowed lands, and validating sales and surveys heretofore made". No mention is there made of tide lands. They are not included in the subject of the act and it is not to be presumed that the legislature intended to make any provision concerning them. The phrase, "and inuring to the state by virtue of her sovereignty", in the first section, was not intended to designate another distinct class of land, but only to indicate that the first mentioned class included only the lands uncovered by the recession of navigable lakes, since they belong to the state in virtue of her sovereignty, and not to lands beneath unnavigable lakes, which belong to the owners of the adjoining upland. (Civ. Code, sec. 830; *Oakland v. Oakland W. F. Co.*, supra, p. 183; *Shively v. Bowlby*, supra, pp. 31, 42; *Foss v. Johnstone*, 158 Cal. 127.)

[12] With regard to the swamp lands involved in this action it is to be noted that the validating clause of section 3493s purports to validate all previously issued patents for "any lands as swamp

and overflowed lands which belonged to any of the classes described in section thirty-four hundred and ninety three-m, whether or not such lands were segregated or sectionized". The only classes mentioned in the previous section were (1) "lands uncovered by the recession or drainage of inland lakes", (2) "swamp and overflowed lands not segregated by the United States". The insertion of the words "whether segregated or not", in the validating clause, if applied to swamp lands, would seem without meaning, because the only swamp land patents mentioned as validated were those for lands not segregated. Some light is thrown on the meaning by section 3493t, which indicates that some of the uncovered land had been segregated by the United States as swamp and overflowed land prior to the passage of the act and declares that the official plats 'hereof are to be deemed valid. No authority existed for such segregation as swamp land, if the lake was navigable, since the land would then belong to the state in virtue of its sovereignty, but owing to the possible doubt as to whether such lakes were navigable or not, the additional words were apparently inserted so as to include patents for uncovered lands, if any, that had been segregated as swamp lands upon the theory that the lakes were not navigable. It is a matter of common knowledge that the act of 1893, afterwards incorporated into the code as aforesaid, was passed to provide for the disposition of the land formerly beneath the waters of Tulare lake and uncovered by its recession, much of which had been settled upon and claimed as part of the swamp and overflowed lands. It cannot be claimed, with reason, that this validating clause, intended to confirm such claims, was understood by the legislature to embrace the segregated swamp lands throughout the state. We therefore hold that, with regard to swamp lands, it applies only to unsegregated lands for which patents or certificates may have been issued.

[13] The defendants further claim that the estate is estopped to claim title to these lands by reason of the fact that they were purchased for a valuable consideration, which the state has not yet returned or offered to return. This proposition, if it was otherwise of any force, is answered, as to lands not reserved from sale, by our conclusion that the patents are effective to carry title to the soil. The defendants have received a consideration for their money, and it is to be presumed that they bought with knowledge of the law on the subject. As to lands reserved from sale no estoppel against the state could arise from the mere payment of the purchase money.

2. The other question presented affects the validity of these patents with respect to lands situated within two miles of the corporate limits of the town of Wilmington as fixed by the act of February 20, 1872, purporting to create and incorporate the town of Wilmington. (Stats. 1871-2, 108.) The act of April 4, 1870, excluded from sale all land within two miles of "any town or village". (Stats. 1869-70, 877). This act was in force at the time the act incorporating Wilmington was passed. The Political Code was enacted at the legislative session of 1872, the same legislature which incorporated Wilmington. Section 3488 of

the Political Code, prior to 1901, excluded from the operation of that article all tide lands or swamp lands within two miles of any incorporated city or town. Section 3 of article XV of the constitution of 1879 is as follows: "All tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations." All the lands in question front on the bay of San Pedro. The act of 1872, incorporating Wilmington, was repealed by the legislature on March 12, 1887 (Stats. 1887, 108, 109). If, in point of law, Wilmington was an incorporated town, within the meaning of the above provision of the code and constitution, during the interval between the passage and the repeal of the law, then all proceedings to purchase the lands in question, taken in that interval, would be invalid with respect to land within the two-mile limit. A considerable part of the land involved is affected in this way. The affidavit and application of J. B. Banning for the purchase of tide land location No. 144, involved in L. A. No. 3077, were filed on March 9, 1887, three days before the act of incorporation was repealed, but the application was not approved by the surveyor general until May 14, 1888, and all the other provisions also occurred after the repeal. The proceedings in tide land locations Nos. 57, 63, 64, 68 and 69, involved in Nos. 3057, 3058, 3059, 3061, 3077 and 3056, were all taken between the date of the passage of the incorporating act and the date of its repeal.

[14] We do not think that the validity of tide land location No. 144 is affected by the fact that the application and affidavit therefor were filed with the surveyor general three days before the repeal of the incorporating act. It was not approved until long after the repeal. It remained on file after the repeal and until the approval, and the filing may be considered as having been effective after the approval as well as before it. Until the approval, it was, at most, a mere unaccepted offer to purchase. It did not become effective until it was accepted and approved, and at that time the above restrictions upon the power of the state officers to make sales of land had been removed by the repeal of the incorporating act and the consequent destruction of the municipal corporation. No impediment to the valid disposition of the soil remained, and no essential part of the proceeding occurred prior to the repeal.

The other of the locations last mentioned, so far as they embrace land within the two-mile limit, present the question whether or not Wilmington was an incorporated town within the restrictions and reservations of the code and the constitution. Section 1 of the incorporating act declares that the tract of land described, containing 2400 acres, "shall hereafter constitute the boundaries of and be known and named the Town of Wilmington". Section 2, so far as material, is as follows: "The government of said town shall be vested in a board of trustees, to consist of five members, a town marshal, assessor and treasurer. Said town shall be a body politic and corporate by the name and style of the Town of Wilmington, and by that name they and their successors shall be

known in law and have perpetual succession, and may sue and be sued in all courts and in all actions whatsoever. . . .” Section 3 provided that the town officers should be elected by the legal voters of the town on the first Monday of April of 1872, and on the first Monday of April of every year thereafter, at an election to be held for that purpose.

Section 4 provided that for the first election the justice of the peace of the township should appoint the election officers, who should proceed to open the polls, receive the votes and declare the results. It appears from the evidence that at the instance of the township justice fourteen citizens met prior to the election day and nominated candidates for the several offices, but that before the day of election came the general sentiment of the citizens was that the incorporation was a mistake, and they did not vote at the election. No election was ever held, and no person or persons ever acted or assumed to act as officers of the town at any time. The citizens did nothing to organize the town government. Upon these facts the defendants contend that the said town of Wilmington was never incorporated and that it never had a legal corporate existence. The argument is that the state could not erect any territory into a municipal corporation without the consent of the citizens concerned, or a majority of them, and that in the absence of such consent and in the face of a refusal to consent, the attempt to incorporate the town was ineffectual for any purpose. It is also urged that the act of the legislature was a mere proposal for a future incorporation, intended to be of no effect whatever until it was accepted by the citizens and a corporate organization effected, and that by their refusal to accept the corporate franchise or to organize under it, the citizens rejected the proposal and prevented the creation of such proposed municipal corporation.

The incorporating act was passed while the constitution of 1849 was in force. The effect of the act depends upon the terms of that constitution. Section 1 of article IV thereof granted all the legislative power of the state to the senate and assembly, constituting the legislature, subject, of course, to such limitations as the constitution elsewhere imposed. Section 31 of the article provided that “Corporations may be formed under general laws, but shall not be created by special acts, except for municipal purposes.” 376 Section 37 provided that “It shall be the duty of the legislature to provide for the organization of cities and incorporated villages”.

“A municipal corporation is a public institution, created for public purposes; the municipality is a political subdivision or department of the state, governed and regulated, and constituted by public law; . . . the original power to control, as well as to create them, therefore, is in the legislature.” (Payne v. Treadwell, 16 Cal. 233.) “Municipal corporations are but subordinate subdivisions of the state government, which may be created, altered, or abolished, at the will of the legislature.” (San Francisco v. Canavan, 42 Cal. 557.) “A municipal corporation is but a branch of the state government, and is established for the purpose of aiding the legislature in making



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provision for the wants and welfare of the public within the territory for which it is organized." (*Chico v. Supervisors*, 118 Cal. 120.) The creation of a municipal corporation is therefore a legislative act. The provisions above mentioned gave the legislature the power to create municipal corporations at will, by special laws. No conditions are annexed to the grant of this power. There are no provisions in that constitution to the effect that the consent or acceptance of the inhabitants or citizens of the particular territory should be necessary to give validity to the legislative act, or should be a condition precedent to the creation of a municipal corporation, nor any limitations whatever upon the power to create them. To create, is to bring into being, to cause to exist. The act of creation is not and cannot be complete until the thing is brought into being and exists. The power to create a municipal corporation, therefore, includes the power to bring such corporation into legal existence. [16] As this power was possessed by the legislature without condition or limitation, it must follow that a given territory could be incorporated as a municipal corporation without the consent or the acceptance of the inhabitants thereof. All the authorities sanction this proposition. In *In re Madera Irrigation District*, 92 Cal. 323, speaking of irrigation districts and after declaring that they were a species of municipal corporations, the court, in argument, remarked: "In the absence of constitutional restriction, it would be competent for the legislature to create such public corporation, even against the will of the inhabitants." (See, also, *People v. Ontario*, 148 Cal. 633; *In re Sanitary Dist.*, 158 Cal. 457.) In *Thomason v. Ashworth*, 73 Cal. 77, decided July 2, 1887, the court said: "Prior to the adoption of the present constitution the legislature was not only competent to create a corporation for municipal purposes by a special law, but could compel a community of persons to accept a charter so created." The remarks above quoted are obiter dicta, it is true, but they correctly state the prevailing and general rule upon the subject. Mr. Dillon says: "The rule which applies to private corporations, that the incorporating act is ineffectual to constitute a corporate body until it is assented to or accepted by the corporators, has no application to statutes creating municipal corporations. These are laws, and, as such, are imperative and binding, according to their terms, without any consent, unless the act is expressly made conditional. . . . And unless otherwise provided by the act itself, or a different intention is manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect." (1 Dill. Mun. Corp., 5th ed., sec 69.) And again: "Public, including municipal, corporations are called into being at the pleasure of the state, and while the state may, and in the case of municipal corporations usually does, it need not, obtain the consent of the people in the locality to be affected. . . . Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent: it may, where there is no constitutional inhibition, erect, change, divide and even abolish them, at pleasure, as it deems the public good to require." (*Ibid.* sec. 92.) (See also *Cooley*

Const. Lim., 7th ed. 166; 28 Cyc. 155; 20 Am. & Eng. Ency. of Law, 1130; 1 McQuillin Mun. Corp., sec. 153, page 352; 1 Abbott, Mun. Corp., sec. 25; 1 Smith Mun. Corp., sec. 52.) Mr. Andrews in his work on American Law, published in 1907, attacks this doctrine of Mr. Dillon vigorously and declares that not a single case cited by the authors asserting the doctrine supports the proposition. Mr. Andrews perhaps means to say that in his opinion the point was not directly involved in any of the cases cited. Certain it is that practically every one of them declares and affirms the proposition as stated by Mr. Dillon. And Mr. Dillon himself, in his later and more elaborate edition of 1911, being the work from which the above quotations are taken, repeats the proposition, notwithstanding the criticism of Mr. Andrews. Furthermore, every text writer on the subject declares it to be the law, and the courts of every state, whenever they have had occasion to touch upon the subject, have either declared or recognized the doctrine with respect to the power of creation, to be as stated by Mr. Dillon. The principle appears, moreover, to be the logical sequence from the premises, namely, first, that the formation of a municipal corporation is a legislative act; second, that such corporations are agencies of the state for carrying on a part of the local government; third, that the whole legislative power of the state, including the power to say what territory shall be formed into such corporations for such purposes, is vested in the legislature, so far as it is not limited by the constitution, and fourth, that the constitution of 1849, under which this act was passed, contained no limitations whatever on the power.

It is, of course, unnecessary to decide here that the legislature could have forced the citizens of Wilmington to attend the election and vote for municipal officers or could have compelled them to take up and perform any of the civic duties incident to citizens of such corporation, or to incur municipal debts or liabilities of any character. It may be that legislative power does not include such extreme power over personal liberty of action. The question here presented involves no such proposition. It is a question of the application of a clause reserving land from sale by the state, a reservation

made for the benefit of municipal corporations, present and
378 future, and for the preservation of public rights likely to become important to a growing town or city, although of little importance when first incorporated. The reservation in the act of 1870 protected towns and villages, whether incorporated or not. It was superseded by the reservation in the Political Code. It was important that the latter reservation should be effective immediately upon the creation of a municipal corporation without awaiting the organization of the municipal government by the citizens. If this were not so, the reservation would usually be ineffective, for inasmuch as the state officers were given no power or discretion to refuse to sell tide land regularly applied for, enterprising speculators could, in that case, easily buy up all the water front after the incorporating act and before the organization took place, and the embryo city or town would lose all benefit whatever from the reservation. It may well be assumed that it was for this reason that the reservation was

made in favor of municipal corporations which were merely incorporated, and was not made to depend on their being organized. The distinction between the incorporation of a municipality and its organization, and the fact that some of them which had been incorporated at the time the constitution of 1879 was adopted, might not then have become organized, was recognized in that constitution. Section 6 of article XI declares that the legislature, by general laws only may provide for the "incorporation, organization and classification" of cities and towns, that those heretofore "organized or incorporated" might reorganize under such general laws, and that "cities and towns heretofore organized" shall be subject to general laws, except in municipal affairs. Thus, by the latter clause, it implies that a city or town could be incorporated, although not organized, and that the application of general laws, meaning, of course, laws other than those providing for incorporation and organization, should not extend to them until organization took place, in case the general law for incorporation should make it possible for some period of time to intervene between the act of incorporation and that of organization. (See *People v. Wilmington*, 151 Cal. 652.) It is therefore to be presumed that the words of section 3 of article XV, reserving tide lands from sale, were chosen advisedly. They reserve such lands within two miles of any city which has been incorporated, whether such incorporation had been followed by organization or not, thus recognizing the distinction made in section 6 of article XI.

[15] From all these considerations we conclude that Wilmington was an incorporated town from the time of the incorporating act until its repeal, unless the terms of the act itself show a legislative intent that acceptance and organization were to be a condition precedent to the beginning of its status as a corporation. The act contains nothing evincing such an intent. It is not couched in the form of a proposal to the inhabitants to form themselves into an incorporated town if they so desired. Its language is positive and direct to the effect that the territory described shall hereafter be known
 379 as and constitute the town of Wilmington, and that it "shall be a body politic and corporate" by that name, with power to sue and be sued. The following sections constitute a town charter and describes the powers thereof. Nothing is made to depend on any acceptance by the inhabitants. The third section declares the times for holding elections; the fourth specifies the person to select the election board for the first election, but neither of them purport to make the holding of such election necessary to the legal corporate existence of the town. An incorporated town may legally exist without officers. (*Elliott v. Pardee*, 149 Cal. 519; *Swampland District v. Silver*, 98 Cal. 54.) The corporate existence was declared in the act as an immediate effect, to follow without further condition, upon the taking effect of the law. The act declares that it shall take effect from and after its passage. There is no force to the argument that because the act declares that the territory "shall hereafter constitute" the town and that "said town shall be" a body politic and corporate, it follows as a consequence that the legislature intended it to become

such at some indefinite time in the future or upon the happening of some future event. No time or future event is specified in the act. Such language, without qualifying expressions or provisions indicating a different time, in ordinary usage means that the effect stated is to take place immediately upon the declaration thereof, that is, in this instance, from and after the passage of the act. The incorporation of Wilmington by the act of 1872, therefore, immediately became effective to put into operation the reservation of lands within two miles of incorporated cities and towns and make it applicable to lands within that distance of Wilmington. This reservation continued to apply to all such lands until the repeal of the act in 1887. The patents based on payments, all of which were made while the reservation was in force, and the proceedings taken during that time, were unauthorized and void.

[17] Some of the patents in controversy in this series of cases were issued after and in pursuance of a land contest in the courts, under section 3414 of the Political Code, as to the right of opposing claimants to purchase the land under the law. Such a contest does not estop the state from claiming and showing that the land was reserved, or that it was and is dedicated to public use. The judgment in such a case merely determines which, if either, of the claimants is a qualified purchaser (not whether the law authorizes a sale of the particular land, but which had the better right) and that the one found to be qualified and having the prior claim is entitled to purchase. The state is not a party thereto and public rights not adjudicated or concluded thereby. (*Polk v. Sleeper*, 158 Cal. 637.)

[18] In the case of *Tide Land Location 132*, here involved, the approval of the application and survey occurred in 1886, before the act incorporating the town of Wilmington was repealed and while the sale of the land was unauthorized and prohibited by reason of the fact that the land was situated within two miles of the town of Wilmington as incorporated in 1872. The 380 patent in pursuance of said application and payment was not issued until May 31, 1887, more than two months after the repeal of the act incorporating Wilmington had removed the restriction and made the subordinate title to the soil open to sale. The appellants claim that the patent thus issued after the restriction was removed is valid, although all the previous proceedings were forbidden at the time they were had, but they do not argue the point or present authorities to support it. Cases holding that a patent is conclusive against collateral attack are not applicable here. This action is by the state itself, in effect to declare the patent invalid. It is a direct attack, by the party authorized to make it. The rule regarding sales of public lands is that all acts of the administrative officers of the state towards such sale, in respect to the lands which the state has withheld from sale, or which are not yet subject to sale, are void, not merely voidable but absolutely void for want of power in the officers, and no subsequent action by the officers themselves can give validity to the void act or ratify it in any way. (*Doolan v. Carr*, 125 U. S. 618; *U. S. Land Assn. v. Knight*, 85 Cal. 485; *Garfield v. Wilson*, 74 Cal. 175; *Wren v. Mangan*, 88 Cal. 277;

Buchanan v. Nagle, 88 Cal. 592; Dewar v. Ruiz, 89 Cal. 387; Polk v. Sleeper, 143 Cal. 72.) A patent for state land, issued by the officers in a case where there has been no valid application or survey approved nor any valid payment of the price, is, of course, void as against the state. The act of the state officers in receiving the price, being wholly unauthorized and absolutely void as an official act, was of no greater force than the act of one not an officer, at least so far as its efficacy to create an equity in the land against the state is concerned. It could not operate to give validity to a patent issued after the restriction was removed. The patent might have been ratified and confirmed by the state, but not by the executive officers whose authority to issue patents was limited to cases where the previous proceedings were authorized. The price was one dollar an acre and in this case it amounted to \$21.73. If it was turned into the state treasury, as is to be presumed, the state is under a moral obligation to refund it, which it is presumed it will discharge when its attention is properly called to the fact. But the possession of the money by the state treasurer has no legal relation to the title to the land and the moral obligation cannot be made the basis of a lien or claim on the land in favor of the defendants in this action.

The question of the statute of limitations is discussed in L. A. No. 3077, *People v. Banning et al.* In the present case, the period has not begun to run. The patent, as we have shown, is absolutely void. Its issuance without authority and contrary to the constitutional prohibition did not set the statute in motion. There has been no adverse possession by the defendants. The only occupancy shown was under certain wharf franchises which, with the improvements made in pursuance thereof, are reserved from the operation of the judgment.

The point that at the expiration of such a franchise, or of
381 a railroad permit, the state cannot take such improvements without compensation, does not arise in this or in any other of the cases. Nor do any of them involve the proposition that improvements or structures made on tide lands by a purchaser, on the faith of a patent which grants him only the servient fee, subject to the public easements, may be taken by the state for purposes of navigation without compensation to him. Nothing that is said in any of this series of opinions is to be considered as applicable to these questions, or as decisive thereof.

The conclusion we have reached as to tide land location 132 is that the patent is wholly void because of the proximity of the land to the town of Wilmington as incorporated in 1872, and that the judgment of the court below was, in effect, correct.

The judgment and order are affirmed.

SHAW, J.

We concur:

ANGELLOTTI, J.

SLOSS, J.

Concurring Opinion.

I concur in the judgment and generally in what is said in the opinion of Justice Shaw so far as it relates to the questions presented by this particular case—a case which hinges upon the proposition that the patent in question was absolutely void ab initio, and under which there was no adverse possession. Such a case does not call for any extended discussion of the effect of a valid conveyance of tide lands as to the interest or estate granted or the reserved rights of the public. As to these matters I prefer to express my views in one of the cases in which the patent cannot be held to have been void, and in which it will be necessary to define the interest acquired by the patentee and the rights reserved to the state. By this I do not mean to intimate that I find myself very widely at variance with the present opinion, but only that I think that in a few particulars it requires some qualification.

BEATTY, C. J.

L. A. No. 3056. In Bank.

DECEMBER 20, 1913.

PEOPLE OF THE STATE OF CALIFORNIA, ETC., Plaintiffs and Respondents,

v.

SOUTHERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND HOMER S. KING, Defendants and Appellants.

[1] Tide Lands—Lands Lying Within Two Miles of Wilmington—Void Patent.—A patent to tide lands lying within two miles of the corporate limits of the town of Wilmington as incorporated by the act of 1872 issued between such date and the date of the repeal of such incorporating act in 1887, is void.

[2] Id.—Lands Beyond Corporate Limits—Patent—Title to Soil Subject to Public Easement.—A patent to tide lands lying beyond two miles from the corporate limits of such town, gives title to the soil subject to the public easement for navigation and fishery.

[3] Id.—Possession Within Two-Mile Limit Under Wharf Franchise and State Permits—Statute of Limitations—Possession Not Adverse.—The possession of tide lands lying within two miles of the limits of an incorporated town under a wharf franchise and state permits for railroad purposes is not adverse to the state, as to the fee, and does not set the statute of limitations in motion and cannot support a title by prescription to any subordinate estate in the land.

[4] Id.—Action to Quiet Title—Title of Defendant—Succession to Rights of Original Patentee—Absence of Finding—Reversal of Judgment.—The failure to find in an action by the state to quiet title to tide lands that the defendant had by mesne conveyances succeeded to all the right and title of the original patentee requires a reversal of the judgment in order that the defect may be supplied, as the appellate court cannot make findings.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellants—J. W. McKinley, Frank Karr; Gibson, Dunn & Crutcher; Ward Chapman; Sheldon Borden, Edward E. Bacon, W. R. Millar, of Counsel.

Amici Curie, for Appellants—Chickering & Gregory; Goodfellow, Eells & Orrick, Donald Y. Campbell, J. W. Lilienthal, H. D. Newhouse; Heller, Powers & Ehrman; Thomas, Beedy & Lanagan, H. H. McCloskey; McCutchen, Olney & Willard.

For Respondents—U. S. Webb, Attorney-General; Leslie R. Hewitt, John W. Shenk, A. P. Fleming, Anderson & Anderson.

The appeals are from the judgment and from an order denying a motion for a new trial.

This is one of the series of cases mentioned in the opinion in L. A. No. 3060, entitled the *People v. California Fish Co.* The present case involves tide land location No. 69. The application and survey therefor were filed on December 23, 1878, payment was made on July 16, 1883, and the patent was issued on August 4, 1883, to William L. Banning. The land embraces a strip of tide land extending along the water front of San Pedro occupied by the defendant railroad companies by railroad tracks and wharves. All of this strip lying north of the prolongation of the center line of Fourth street in San Pedro lies within two miles of the corporate limits of the town of Wilmington as incorporated by the act of 1872. The remainder thereof is beyond said limits. The law governing the case is the same as that stated in the aforesaid opinion in L. A. No. 3060, and we refer to that opinion for the discussion thereof. [1] The land within the two mile limit was withheld from sale at the time this patent was issued, and Banning obtained no title thereto by his patent. [2] With respect to the land beyond those limits he obtained title to the soil as mentioned in said opinion, subject to the public easement for navigation and fishery.

The appellants claim certain rights under a wharf franchise and permits issued by the state authorities, respectively, on June 4, 1881, and April 7, 1887, the latter being issued under the provisions of section 478 of the Civil Code. Under it the railroad company built a track and established wharves at San Pedro on the premises. Upon the trial it was stipulated that the rights of the appellants under these permits should not be considered or adjudicated, and the judgment accordingly saves them.

383 [3] The defendants also claim title by prescription and set up the bar of the statute of limitations. With respect to all that part of the tract lying within two miles of Wilmington, there has been no possession by defendants, except under the wharf franchise and state permits for railroad purposes above mentioned. This possession was not adverse to the state, as to the fee, but was attributable solely to the right of possession by virtue of the franchise and permits. It did not set the statute of limitations in motion, and could not support a title by prescription to any subordinate estate in the land. The land lying beyond the two-mile limit was

not reserved at the time of the tide land purchase. Under the principles stated in the aforesaid opinion in L. A. No. 3060, the patent, as to this part, conveyed title to the patentee, subject to the public easements for navigation and fishery. This is all that could be gained by defendants by adverse possession, or statute of limitations. It is therefore unnecessary to consider the effect of adverse possession of the land outside of the two-mile limit.

[4] With respect to the title under the state patent, the court made no finding of the fact that the Southern Pacific Railroad Company had, by mesne conveyances, succeeded to all the right and title of William L. Banning. This fact was proven and it is not disputed. This court, in the exercise of its appellate jurisdiction cannot make findings, and as this fact is essential to a proper judgment saving the rights of the defendants to the soil of all that part of the land lying south of the prolongation of the center line of Fourth street aforesaid, subject to the public easement for navigation, it will be necessary to reverse the judgment in order that said defect may be supplied. The court below, upon the going down of the remittitur, will make a finding on this subject upon the evidence already given in the cause and such additional evidence as may be offered relating to the fact mentioned, and thereupon enter such judgment as the fact may warrant. If the railroad company has succeeded to said right and title judgment will be given protecting their interests in conformity with the principles stated in the aforesaid opinion in L. A. No. 3060.

The order denying a new trial is affirmed except as below stated. The judgment is reversed with directions to the court below to proceed to take evidence and make the additional finding as stated in this opinion and render judgment in accordance therewith.

SHAW, J.

We concur:

ANGELLOTTI, J.

SLOSS, J.

Concurring Opinion.

I concur in the judgment of reversal, and in the reasons fully set forth in the opinion of Justice Shaw in L. A. No. 3060 upon which the present judgment is based. It would be sufficient, I think, in remanding the cause for further proceedings to direct the superior court to quiet the title of the state to so much of the land described in the Banning patent as lies within the two-mile limit of the town of Wilmington as originally incorporated, and to quiet the title of the successors of Banning to the remaining portion of the land so described against all claims of the state except the rights reserved to the public by section 2 of article XV of the constitution. The case presented by the record does not, in my opinion, call for any elaborate discussion, or exact definition of the full extent of those rights, but since my associates have gone so fully into those questions I take occasion to state briefly my own views as to the effect of a valid conveyance of a por-

tion of our tide lands, and to define, as well as I can, what, in my opinion, is the interest acquired by the patentee and what the nature and extent of the rights reserved to the state.

To this end it will not be unprofitable to give some preliminary consideration to the origin and nature of the state's title to its tide lands and lands underlying its navigable waters which, for brevity, may be called its submerged lands.

When the thirteen Federated Colonies achieved their independence of the British Crown, each acquired the absolute ownership and dominion of the tide lands and of all other lands covered by navigable waters within their respective boundaries, with the possible exception of parcels of such lands that may have been included in valid grants antedating the revolution. Over the lands so acquired each of those independent colonies or sovereign states possessed the same absolute power of management and disposition as King, Lords and Commons combined had before possessed. When, afterwards, they formed a union by the adoption of our federal constitution they surrendered to the national government a paramount right of regulation and management of all their navigable waters necessary or convenient for the purposes of foreign or interstate commerce, but retaining to themselves all rights not incompatible with the right so surrendered. When, at a still later date, the United States acquired by treaties of cession extensive territories previously under the dominion of foreign states, the tide lands and lands covered by navigable waters within such territories became subject to the control and disposition of congress except so far as the titles of prior grantees were protected by stipulations contained in the treaties of cession.

Anticipating the future conversion of these acquired territories into states, and with a view to their admission into the union upon terms of perfect equality with its original members, the government seems to have adopted the policy of reserving from sale for the future benefit of those embryo states the lands within their boundaries lying below the line of high tide. All that has been here said is illustrated by the history of California, and it results that, in fact as in theory, upon her admission into the union upon terms of equality with the states that formed the union she was endowed with the same powers over her navigable waters and tide lands that they possessed after their concession to the general government of a superior power of regulation for a particular purpose. The people of California therefore, subject to this sole qualification, have the power to manage and dispose of their tide and submerged lands in such manner as they may deem most advantageous. The alienation of such lands is a legislative act, and what the people may do the legislature may do except so far as its general power of legislation is restrained by special limitations in the constitution. Prior to the adoption of the constitution of 1879 there were no restraints upon its power relative to this matter and accordingly we find that for more than sixty years not only tide lands but submerged lands have been granted, first by special acts of the legislature—as in case of the water front of San Francisco,

Oakland, Benicia, etc.—and later by subordinate agents acting under the authority of the statutes referred to in Justice Shaw's opinion in L. A. No. 3060. To deny the power of the state to alienate its tide lands is to deny the validity of the disposal of the water front of San Francisco. But who, at this day, would maintain the right of the state to have her title to that water front quieted against the claims of the present occupants? As to the right and power of the state to convey into private ownership portions of its tide lands there ought to be no question, and that right and power being conceded, it must be admitted that it rests with the legislature to designate the portions to be so conveyed and to prescribe the terms and conditions of the grant, subject always to the constitutional limitation upon its powers. Those limitations, so far as I am aware, are all contained in article XV of the constitution, and as they affect the question here, in section 2 of that article, which reads as follows:

"No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof."

In construing grants of tide lands made before the adoption of the present constitution the courts of this state had established the doctrine that the rights of the grantee were subject to the public right of navigation, and this clause of the constitution in plain and concise terms makes that doctrine a part of our fundamental law. And when the fundamental law of the state, assuming the power of the legislature to alienate the tide lands, proceeds to define the rights reserved to the public by its grants, the implication is that they are the only rights reserved. If this is true, the terms of the section above quoted leave little room for construction. The grantee takes the entire estate and interest in the land subject to free rights of way from the uplands to the water front whenever they are required for public purposes. In the meantime he may subject the

land to any use or alteration he may find profitable so long
 386 as he does not obstruct the free navigation of the bay, harbor, estuary, etc. If for instance his grant covers mud flats which can be filled in or otherwise reclaimed without detriment to the public right he may do so and a fortiori he may do what is advantageous to the public right—he may put structures upon the land and maintain them there until they are found to be a nuisance in a proceeding to declare them so—each case of this kind to be determined upon its own merits. In this connection I desire to say that the opinion of Justice Shaw goes too far where he says that in grants of tide lands there is reserved "to the state, or its authorized agencies the right to enter upon such lands and make such erections thereon or changes therein as it may find necessary or advisable to adapt the premises for use in navigation or in furtherance there-

of." This means, if I understand it, that where the grantee has done nothing to obstruct navigation, the state, to carry out any and every sort of plan of its agencies for the improvement of a harbor may take back the granted land without compensation. As to the question of compensation the passage of Justice Shaw's opinion above quoted is qualified in another place, but even with that qualification it goes too far. I concede that, if after selling a portion of its tide lands within a bay or natural harbor, the state should adopt a comprehensive plan of harbor improvement, such as the establishment of a harbor line and the construction of a sea wall with docks and piers on that line, any tide land lying beyond that line would be subject to the superior right of the public upon equitable compensation being made to the vendee for his improvements taken, and since the vendee would at the same time become the absolute owner of that portion of the grant inside of the harbor line freed from the former servitude, its increased value might amount to full compensation for the portion and improvements lost.

I have not chosen to encumber this general statement of my views upon the matters so elaborately discussed in the opinion of Justice Shaw by citing the numerous authorities in point. Most of them are cited by him, including *Shively v. Bowlby* (152 U. S. 29), and *Illinois Central R. R. v. Illinois* (146 U. S. 468), upon which I mainly rely. In conclusion I refer—without quoting it here—to what I said concerning the doctrine of the last named case in my opinion in the Oakland water front case, 118 Cal. at pp. 182-3-4.

BEATTY, C. J.

I agree in the main with the concurring opinion of the chief justice. I differ from the views expressed in the prevailing opinion, and perhaps from the views expressed by the chief justice over the question of the title taken by private owners under grants authorized by and made under the tide lands act. So far as those grants were made after the effective date of article XV, section 2, of our constitution, no difficulty is presented. All such grants were taken subject to the restrictions and limitations of the constitution, and it is sufficient in the case at bar to direct the trial court to enter its

387 decree so declaring, without here attempting to define the scope of those constitutional limitations before argument and in advance of a full presentation of the questions.

But upon the title taken under such grants made before the operative date of article XV, section 2, my views differ radically from those expressed in the prevailing opinion, and while, by virtue of the fact that practically all of the lands here involved were acquired subsequent to the constitutional provision, the question is of no consequence in the present cases, yet as the court has unnecessarily gone into an elaborate consideration of the matter, it seems to me proper to express my views.

The power of the state to deal with and dispose of its tide and submerged lands (always under the recognized supreme power of the United States over them) has been stated over and over again by the Supreme Court of the United States to be absolute. Thus in

Hoboken v. Pennsylvania R. R., 124 U. S. 656, it is said: "Lands below high water mark on navigable rivers are the absolute property of the state, subject only to the power conferred on congress to regulate foreign commerce and commerce between the states, and they may be granted by the state, either to the riparian proprietors or to a stranger, as the state may see fit." And in *Weber v. Harbor Commissioners*, 18 Wall. 57, it is said, concerning this class of lands in our own state: "Upon the admission of California into the union upon equal footing with the original states, absolute property in and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government." Moreover, until the decision of *Illinois Central R. R. v. Illinois*, 146 U. S. 387, no court had ever held that the action of a state legislature in disposing of these lands was subject to judicial review upon the theory that any such disposition violated the state governmental trust upon which they were held. Still less was it ever adjudicated that a federal court would decree that a state had violated the state governmental trust upon which it held these lands, and that therefore a federal court (the supreme control of the United States government over the matter not being in question) would declare void a grant solemnly made by a state of any part of such lands.

The power of the state in dealing with such lands is not limited to the disposition into private ownership of such parcels as are to be used in aid of commerce. True, parcels may be so disposed of. The rule, however, is and always has been, and is so asserted and reasserted even by the majority in the Chicago water front case, that the state may dispose into private ownership of parcels that are not to be used in aid of commerce, that are to be taken away from the possibility of commerce, provided this disposition does not impair the public trust to maintain sufficient of these waters and lands for purposes of navigation and commerce. Thus the state
388 may not only sell such lands for the purposes of the construction of wharves, slips, warehouses and the like, but she may sell them also to be wholly reclaimed from the sea, and when so reclaimed to be devoted to any one of the innumerable legitimate objects of modern civilization—stores, warehouses, factories, residences or agriculture.

This, in varying language, is repeatedly said in the majority opinion in the Chicago water front case. Thus, "it is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which being occupied do not substantially impair the public interest in the lands and waters remaining that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power."

The prevailing opinion at length discusses the acts of the state in offering for sale its tide lands at a fixed price, passes lightly over the fact that all such lands within cities and towns and within two miles of their boundaries were excluded from sale, and declares, from the nature of these granting acts, it is not to be assumed "that the state, which is bound by the public trust to protect and preserve this public easement and use, should have intentionally abrogated the trust as to all lands not within the very limited areas of the reservations, and directed the sale of any and every other part of the land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement which it was its duty to protect, and for the protection and regulation of which it received its title to such lands."

From this view I utterly dissent. The whole legislation of the state of California demonstrates to my mind beyond peradventure that the legislature had keenly in mind its own powers and the limitations upon them; that it was well aware of the need of retaining sufficient of these lands (tide and submerged) for the free use and development of commerce, and that it did so by declaring that it would not grant into private ownership any of such lands, the private ownership of which might interfere with commerce and navigation, within from two to five miles of any city or town—wiser legislation than is found in the statute books of most states, and the only limitation upon the legislative power of sale fixed by the present constitution (art. IV, sec. 3): that it knew, while California had a coast line exceeding a thousand miles in length, that the harbors upon this line were very few. Cities and towns were then upon these harbors and it preserved the utmost freedom of commerce by refusing to sell to private citizens any of these lands, not only within the limits of cities and towns, but within from two to five miles of the boundaries thereof. As to the rest of these lands the offer of them by the state for sale was a declaration by the state that they were not needed for purposes of public commerce and navigation; that their title and their use might better go into private ownership, the lands to be reclaimed, if they were susceptible of reclamation, and to be devoted to any use to which, after reclamation they might be put, or to be devoted to purposes of commerce, if along our inhospitable shore some enterprising owner might find a cove, erect a wharf, and build up a coastwise business. To say that such an offer of sale means, as the prevailing opinion says, that the state was always preserving the *jus publicum*, is to make all the precautionary measure which the state actually adopted vain and ridiculous. If the state in these public offers of sale was retaining the *jus publicum*, it might just as well have hoodwinked its citizens still further by allowing them to purchase the lands which it reserved within the five and two-mile limits of cities and towns. It could just as freely have sold those lands and then made answer that it was selling merely the *jus privatum*. What would be said if the city of San Francisco should offer for sale in lots one of its public parks, survey the lands, make sales, sweep the money into its strong box, execute

its deeds without reservation, and when the purchaser came to take possession meet him with the declaration that of course all that it was selling was the *jus privatum*, which he could enjoy only when the *jus publicum* was abandoned? We repeat that the state has shown no disposition as yet to do this thing. But that it may be done under the sanction of the prevailing opinion there can be no doubt, and I am compelled to dissent from the view that any principle of law or equity countenances such a statutory construction.

It is said in the prevailing opinion that by our decisions upon these tide lands "the double right of the state, private and public, does not seem to have been suggested or considered". The answer to that is complete. The earlier judges of this court were not, as is implied, ignorant of the common law. They had full knowledge of the governmental trust in navigable waters of the *jus privatum* and the *jus publicum*. Upon numerous occasions they evinced this knowledge. Their silence while reviewing the acts in question, like the silence of the Supreme Court of the United States in the Chicago case, arose from the fact that never until now was it supposed that the sale by the state was anything other than a sale of all her interest, that her patent, containing no reservation was a declaration that the lands sold could go into private ownership without impairment of the state's governmental duty to preserve enough of them for purposes of commerce and navigation. Let us instance the very grant here under consideration to show how utterly inapplicable the theory that by them the state has abandoned or surrendered a public trust, or that to construe the grants as I construe them, would be the equivalent of declaring that the state had surrendered such trust. Let us take the known conditions existing in the harbor of San Pedro. Speaking generally, the uplands about that harbor have been incorporated with the city of Los Angeles. The city of Los Angeles admittedly owns, for public purposes, harbor lands and facilities for wharfage, dockage and slips, sufficient to accommodate the commerce of Liverpool and Antwerp combined. There is not the slightest pretense here made, and none can be made, that by sustaining

390 these grants the harbor of a great city is given over to private ownership, or that the commerce of a great maritime port is bottled up. These particular grants are insignificant in area and extent as compared with the lands for harbor purposes unquestionably controlled and owned by the city of Los Angeles, and yet we are asked to believe because certain small fractions of the tide lands (not even the submerged lands) have years and years ago been purchased and paid for, that to uphold the complete ownership of those lands in the private individual under a grant by the state, which in no way limits that ownership, or even to say that the state should in retaking them repay what it had received for them, is to work some appalling destruction of a governmental trust. As wholly untenable to my mind is the general proposition that to construe the state's offer to sell these tide lands as an offer to sell its whole interest into private ownership works a destruction of the governmental trust. First,

there is the reason already pointed out that the state has studiously reserved from sale all the lands which it then considered necessary for purposes of public commerce, and, second, because the argument presupposes the purchase into private ownership of the whole coast line of California. Such an amazing result in all the years that have followed has of course never taken place; never could or would take place. The state knew of every sale which was made under its offer, and the state could at any time, if it considered that private owners were increasing too rapidly in number and its tide lands were being too rapidly taken over into private ownership, have repealed its laws and withdrawn its offer. To my mind the rational way to view the offer to sell, the only way indeed in which it must be viewed, is to take the case of Richard Roe, who has purchased a quarter of a mile of mud flats, who has reclaimed them from the ocean, who has built his home or factory upon them and who is now told that he must surrender possession without compensation at the demand of the state or any of its agencies, because all that he bought is a *jus privatum*, and if he contends that he bought more, then it must be answered that to hold with this contention is to destroy a great governmental trust.

I do not for one moment question the right of the state to retake any of such lands which she may have improvidently sold or which subsequently, by the growth and development of commerce seem to her necessary for purposes of navigation. But I deny utterly that she can do this by way of confiscation, without payment to the private owner for his private loss. And I care not whether it be said that the lands were sold into private ownership in aid of commerce acting through private persons, or whether it be said that they were sold as land not necessary for commerce, or whether it be said that they were sold without any specific declaration or intent whatever upon the subject. If a citizen's private rights of property are to be taken after such a sale or grant, they are not to be taken under the fiction of a reserved *jus publicum*. They are to be taken under the actual dominium *eminens*—the right of eminent domain, and compensation must be made therefor, or else there is sheer confiscation. Therefore, I say that the

391 construction put upon these grants of tide land does violence to the law and that such construction if given execution violates the constitution of this state and of the United States.

HENSHAW, J.

We concur:

MELVIN, J.
LORIGAN, J.

L. A. No. 3057. In Bank.

December 20, 1913.

PEOPLE OF THE STATE OF CALIFORNIA, etc., Plaintiffs and Respondents,

v.

BANNING COMPANY, MARY H. BANNING, LUCY T. GREENLEAF, Hancock Banning, Mary H. Orris, Los Angeles Harbor Company, Pacific Electric Railway Company, and Imperial Investment Company, Defendants and Appellants

L. A. No. 3058. In Bank.

December 20, 1913.

PEOPLE OF THE STATE OF CALIFORNIA, etc., Plaintiffs and Respondents,

v.

SOUTHERN PACIFIC COMPANY, SOUTHERN PACIFIC RAILROAD COMPANY, HOMER S. KING, Defendants and Appellants.

[1] Tide Lands—Lands Within Two-Mile Limit of Incorporated Town—Void Patent.—A patent to tide lands lying within two miles of an incorporated town is void.

[2] Id.—Possession of Tide Lands—Grant of Way for Railroad Track—Discontinuance of Track—Effect of.—The discontinuance by a railroad company of the maintenance of a railroad track on tide lands under a right of way obtained in pursuance of the act of May 20, 1861, terminates its right to hold possession thereof, notwithstanding that it thereafter rented the premises to some of its employees.

[3] Id.—Lease of Submerged Lands by City of Wilmington—Improvement of Water Front—Void Lease.—A lease made by the city of Wilmington (a city of the sixth class incorporated in 1905 under the general law) of submerged land always covered by water to a private company in consideration of the latter improving the water front of the city, is void, as such lands belong to the state, in the absence of a grant thereof to the city.

[4] Id.—Municipal Corporations—Improvement of Water Front—Scope of Power—Lease of Lands Belonging to State Unauthorized.—The provisions of the Municipal Corporation Act giving cities incorporated thereunder the power to improve their water fronts do not include authority to lease to private parties for public uses lands belonging to the state and not covered by or necessary to the improvement, as a consideration for a water front improvement to be made by such parties for public use.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellants—J. W. McKinley, Frank Karr; Gibson, Dunn & Crutcher; Ward Chapman, Floyd W. Moultrie, Sheldon Borden; Edward E. Bacon and W. R. Millar, of Counsel.

For Respondents—U. S. Webb, Attorney-General; Anderson & Anderson, Leslie R. Hewitt, John W. Shenk, A. P. Fleming. (Smith, Miller & Phelps; Amici Curiae for Validity of Patent).

392 The appeals in these two cases are from the judgments and from orders denying motions for new trial in the respective cases.

The land involved is that known as tide land location No. 57, being the same location mentioned by that number in the opinion in *People v. California Fish Co.*, L. A. No. 3060. That opinion, with the exceptions hereafter noted, covers all the points of law involved in the present cases. The first payment upon this tide land location was made on March 5, 1880. The certificate was issued on April 10, 1880, and the patent was executed on December 16, 1881, to Phineas Banning. [1] The land all lies within two miles of the limits of the town of Wilmington as incorporated by the act of 1872, and under the principles stated in *People v. California Fish Co.* aforesaid the patent is void and all claims of any of the defendants thereunder are invalid.

[2] In 1871 the Southern Pacific Railroad Company constructed a railroad track over a part of this land under a right of way obtained in pursuance of the act of May 20, 1861. (Stats. 1861, 607). It also built a wharf adjoining said track. In 1890 the wharf was destroyed by fire and soon afterwards, and more than ten years before this action was begun, the track was taken up and has never been replaced. No use has been made of the premises covered by this permit for the track so removed, except that a barn about twenty by twenty-five feet in size was maintained thereon, together with a residence building and outbuildings. This use was not in connection with any railway or with the business of running a railway, except that it was rented to some of the employees of the railroad. The wharf was not rebuilt or otherwise used. Section 20 under which this permission was given (Stats. 1861, 618) provides that if the road, after its location, shall be discontinued or abandoned, or the location of any part thereof be changed so as not to cover the lands of the state over which the permission was given, such land shall revert to the state. Section 22 provides that the company receiving such permission shall not hold the real estate or any right, title or interest therein after it shall have failed or ceased to use the same for the maintenance of such track for five years continuously. Under these provisions it is obvious that all right of the appellants to hold possession of the lands has ceased and the court properly so held.

Some objection is made to the sufficiency of the location of

the line of high tide in the findings and judgment. It is not necessary to discuss the subject. The line given as the line of high tide is a well defined government survey and we think the description is sufficient.

[3] The only other matter not covered by the aforesaid opinion in *People v. California Fish Co.* is the claim of the appellants, Los Angeles Harbor Company and Imperial Investment Company, under a lease by the city of Wilmington, executed on April 11, 1907, to the Investment Company, for the term of fifty years, for some 15.37 acres of the tide lands covered by the state patent, in consideration whereof the company agreed to dredge a twenty-
393 foot channel to deep water and construct slips adjoining it for the improvement of the facilities for ocean navigation, make a bulkhead or sea wall, and to fill in the space between the channel and the west shore of the bay. The land to be reclaimed by such fill was the land covered by the fifty-year lease to said company. The channel and slips were apparently to be devoted to public use, although it is not expressly so provided in the lease. The city of Wilmington, here mentioned, is a city of the sixth class, incorporated in 1905 under the general law. Subdivision 2 of section 862 of the municipal corporation act gives such cities power to purchase or receive real estate inside or outside the city limits necessary for municipal purposes "and to control, dispose of and convey the same for the benefit of the city or town: provided, they shall not have power to sell or convey any portion of any water front." (Stats. 1909, page 420). Subdivision 2 of the same section empowers such cities "to improve the water front." The land included in the lease was, in part, submerged land always covered by water.

The city of Wilmington had no title to or interest in the land leased. It belonged to the state in virtue of its sovereignty, and no act ceding it or transferring it to the city has ever been passed. The city had nothing but a mere power to improve the water front, a power delegated to it by the state. The power to improve the water front does not include authority to lease to private parties for private uses lands belonging to the state and not covered by or necessary to the improvement, as a consideration for a water front improvement to be made by such private parties for public use. The lease was clearly beyond the powers of the city and transferred no part of the state's title to the land nor any interest or estate whatever therein.

[4] The case of *Pacific C. F. Co. v. Kimball*, 114 Cal. 414, is not in point. The lease there considered was made by the city of Monterey, under an express grant by the state to the city of all the water front for the use and benefit of the city, with authority to lease portions of the water front for periods not exceeding ten years. (Stats. 1867-8, 202). The wharf right there in controversy was held good because of this grant and this power. In the present case there was no legislative authority to lease lands owned by the state. The decision in *San Pedro etc. Co. v. Hamilton*, 161 Cal. 610, cited by these appellants in support of their claim, involved leases of sub-

merged and tide lands, made by the cities of Long Beach and San Pedro, respectively, both of which leases were confirmed by the state by the act of March 23, 1907 (Stats. 1907, 987), and it was for this reason that the leases were held to be valid with respect to the authority to make them. The lease to the appellants was made after that act was passed, it is not validated or affected thereby and the state has never confirmed it. On the contrary, so far as it can do so, the state, by the act of May 1, 1911 (Stats. 1911, 1256), has revoked the appellants' lease by granting to the city of Los Angeles, to be used and managed for the public purposes of navigation,
 394 all the land embraced in said lease. The court below correctly held the lease to be void.

The judgment and order are affirmed.

SHAW, J.

We concur:

ANGELOTTI, J.

SLOSS, J.

BEATTY, C. J.

L. A. No. 3059. In Bank.

December 20, 1913.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs and Respondents,
 v.

SOUTHERN PACIFIC RAILWAY COMPANY, SAN PEDRO LUMBER COMPANY, Kerekhoff-Cuzner Mill and Lumber Company, Pacific Electric Railway Company, Los Angeles Interurban Railway Company, Pacific Electric Land Company, Banning Company, Southern Pacific Company, William Banning, Joseph Banning, Homer S. King, Defendants and Appellants.

[1] Tide Lands—Lands Within Two-Mile Limit of Wilmington—Void Patent—A patent to tide lands or submerged lands lying within two miles of the limits of the incorporated town of Wilmington is void.

[2] Id.—Id.—Construction of Electric Railroad—Absence of Permit—Effect of.—The construction of an electric railroad over a part of such land without a permit either from the state or municipal authorities, gives no right to such land.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellants—J. W. McKinley, Frank Karr; Gibson, Dunn & Crutcher; O'Melveny, Steven & Milliken. (Ward Chapman, Sheldon Borden, Edward E. Bacon, W. R. Millar, of Counsel.

For Respondents—U. S. Webb, Attorney-General; Leslie R. Hewitt, John W. Shenk, A. P. Fleming, Anderson & Anderson.

In this case separate appeals from the order denying a new trial and from the judgment are presented, one by the San Pedro

Lumber Company and the other by the other defendants. The action is in all respects similar to the action in *People v. California Fish Co.*, L. A. No. 3060, in which we have fully discussed all of the questions involved in this action except those herein-after mentioned. The case involves the land embraced in tide land locations Nos. 63 and 64. Applications and surveys for these locations were approved on April 11, 1881, first payments were made on April 15, 1881, certificates of purchase were issued on April 23, 1881, to P. C. Learned, and a single patent was issued for both locations to said Learned on May 16, 1882. Certain wharf franchises and permits for railroad and wharf purposes, being those mentioned in L. A. No. 3056, *People v. Southern Pacific Railroad Company et al.*, and also a wharf franchise granted by the city of San Pedro, were excluded from consideration by the court below and all rights claimed thereunder were excepted 395 from the judgment in favor of the plaintiff. A large part of the lands are and always have been, above the high tide line. The court below found that this upland was the property of the defendant, San Pedro Lumber Company, and gave judgment to that effect. That company, in its brief, does not claim by prescription. The remaining portion was found to be a part of the state tide and submerged lands and was adjudicated to be the property of the plaintiff. [1] All of the land lies within two miles of the town of Wilmington as incorporated in 1872. The question of the validity of the patents under which the defendants claim the tide lands was fully discussed in the opinion in L. A. No. 3060 aforesaid, this case being one of the series of cases therein mentioned. Upon the principles there stated, the patent conveyed no title to tide lands or submerged lands.

[2] The Los Angeles Interurban Railway Company constructed an electric railroad over a part of the land, being a part of its line from Los Angeles to San Pedro, and operated the same for some time and then leased it to the appellant, Pacific Electric Railway Company, which has ever since operated it. The railway was constructed less than five years before these actions were begun. It does not appear that either company ever obtained a permit to build and maintain the railroad, either from the state or the municipal authorities. The court below correctly decided that no right to the tide land was gained by this use for railroad purposes.

An error was made in the judgment respecting the upland awarded to the San Pedro Lumber Company. The Southern Pacific Railroad Company and the Los Angeles Interurban Railway Company have certain titles and rights therein which are not mentioned in the judgment. The parties have stipulated that this error may be corrected by this court by a specified modification of the judgment. This modification will be made in accordance with the stipulation, but without costs. In other respects the judgment is correct.

The order denying a new trial is affirmed.

The following clause in the judgment appealed from, to-wit:

"And as to said excepted portion above described it is ordered, adjudged and decreed that the San Pedro Lumber Company is the owner thereof" be changed and modified so as to read as follows:

"And as to said excepted portion above described it is ordered, adjudged and decreed that the San Pedro Lumber Company is the owner thereof, except all that portion thereof described as follows: Commencing at a point on the center line of the Southern Pacific Railroad Company, where said center line intersects United States bulkhead line between stations 52 and * * * of the survey of bulkhead lines which was established by the United States in July, 1908, in San Pedro harbor, and running thence southerly along said railroad following the curvature thereof and embracing a strip of land twenty (20) feet on each side of said center line to the southerly boundary of said last above described land, and it is ordered, adjudged and decreed that the Southern Pacific Railroad Company is the owner thereof; also except an easement for right of way conveyed prior to the commencement of this action by the San Pedro Lumber Company to the Los Angeles Interurban Railway Company by deed dated February 25th, 1905, and recorded in book 4001, page 13, of deeds, records of Los Angeles county, California; and it is ordered, adjudged and decreed that the Los Angeles Interurban Railway Company is the owner of said easement of right of way last described," and as so modified the judgment is affirmed without costs to respondent.

SHAW, J.

We concur:

ANGELLOTTI, J.

SLOSS, J.

BEATTY, C. J.

L. A. No. 3077. In Bank.

December 20, 1913.

THE PEOPLE OF THE STATE OF CALIFORNIA, upon Information of
U. S. WEBB, Attorney-General, Plaintiff and Respondent,

v.

BANNING COMPANY, KERCKHOFF-CUZNER MILL AND LUMBER COMPANY, Pacific Electric Company, Mary S. Banning, Lucy Greenleaf and Mary H. Norris, Defendants and Appellants.

[1] Tide Lands—Title of Patentee—Soil Subject to Public Easement.—A patent for tide lands conveys to the patentee the title to the soil subject to the public easement for navigation and fishery.

[2] Id.—Tide Lands Within Two Miles of Wilmington—Void Patent.—Tide lands lying within two miles of the town of Wilmington, as incorporated by the act of 1872, are reserved from sale, and a patent thereto is void.

[3] Id.—Id.—Approval of Application and Acceptance of Purchase Money Between Incorporation and Repeal—Unauthorized Acts.—The approval of the application and survey, the acceptance of the purchase money, and the issuance of a patent for a tide land location within two miles of Wilmington made between the date of incorporation of said town (1872) and the repeal of the act and the incorporation of San Pedro (March 1, 1888) are unauthorized acts, and the patent void.

[4] Id.—Swamp Lands Within Two-Mile Limit of San Pedro—Reservation from Sale—Void Patent.—A patent to swamp lands lying within two miles of the corporate limits of the city of San Pedro (incorporated March 1, 1888), is void, where the approval of the application was made after the incorporation of such city, and during the time such lands were reserved from sale by the constitution.

[5] Id.—Statute of Limitations—Action by State—Construction of Code.—Under Section 315 of the Code of Civil Procedure, an action by the state to quiet title to lands may be brought at any time within ten years after the cause of action accrues.

[6] Id.—Statute of Limitations—Operation Against State—Presumption of Grant Unnecessary.—The running of the statute of limitations does not depend upon the presumption of the existence of any grant, but it operates upon the state with respect to any property not dedicated to public use, as soon as adverse possession thereof begins.

[7] Id.—Swamp Lands—Adverse Possession for ten
397 Years—Statute of Limitations—Bar of Action by State.—
action by the state to quiet title to swamp lands is barred by provisions of section 315 of the Code of Civil Procedure, where they have been held in actual adverse possession for more than ten years by a claimant under a state patent.

[8] Id.—Swamp Lands—Littoral Rights of Owners Over Adjoining Tide Lands—Subordinate to Public Easement.—Littoral rights of swamp land owners over adjoining tide lands and waters are subject and subordinate to the public easement for navigation.

[9] Id.—Statute of Limitations—Tide Lands Subject to Public Easement.—Title by adverse possession cannot be acquired against the state as to tide lands which in any wise affect the right of the state or of the public to use the land for the purposes of navigation or fishery.

[10] Id.—Id.—Id.—Adverse Possession to Fee Subject to Public Easement.—Title by adverse possession, however, may be acquired as to the fee in such tide lands subject to the right of the public to use the same for the purposes of navigation and fishery.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellants—Gibson, Dunn & Crutcher; J. W. McKinley, Sheldon Borden, Edward E. Bacon, W. R. Millar, of Counsel. (Frank Karr, Ward Chapman; O'Melveny, Stevens & Millikin.)

For Respondent—U. S. Webb; Anderson & Anderson; Leslie R. Hewitt, A. P. Fleming.

The defendants appeal from the judgment and from an order denying their motion for a new trial.

[1] This is one of the series of cases mentioned in the opinion in *People v. California Fish Company*, L. A. No. 3060. [2] The claim of the appellants that a patent for tide lands would convey to the patentee the absolute estate in the land free from the public easement for navigation and fishery and the claim that land within two miles of the town of Wilmington, as incorporated by the act of 1872, was not reserved from sale, are both disposed of adversely to the appellants by the opinion in that case. No further discussion of those claims is necessary.

In the present case, and in L. A. No. 3061 of the series of cases referred to, the appellants claim that they were in adverse possession of the land for more than ten years before the action was begun and, consequently, that they have title thereto by prescription and that the action is barred by the statute of limitations. Some minor questions involved are also omitted from case No. 3060. We proceed to the consideration of these questions.

[3] The land here is controversy consists of two tracts, one known as tide land location 144, containing 198.65 acres, the other swamp land location 3088, containing 55.29 acres. One defendant also claims under tide land location 68, which in part overlaps swamp land location 3088. The application and survey for tide land location 68 were filed on December 23, 1878. The first payment was made on March 7, 1882. The last payment was on December 24, 1890, and the patent was issued on October 16, 1894. It does not appear that any payment was made during the interval between the repeal of the act incorporating Wilmington and the incorporation of San Pedro on March 1, 1888. Under the principles stated in case No. 3060 aforesaid, the land was reserved from sale from 1872 until 1887, when the Wilmington act was repealed, and again for the time ensuing the incorporation of San Pedro. Hence the approval of the application and survey, the acceptance of the purchase money, and the issuance of the patent for tide land location 68 were each without authority and the patent therefor was void.

[4] The land embraced in tide land location 144 and in swamp land location 3088 is all within two miles of the corporate limits of the city of San Pedro, incorporated March 1, 1888. From that date forward all these tide lands were reserved from sale by the constitutional reservation and both the swamp land and the tide land were reserved from sale by section 3488 of the Political Code,

until the year 1901, when the reservation of swamp lands was eliminated therefrom by amendment. The application and survey for tide land location 144 were filed March 9, 1887. The approval thereof was made on May 14, 1888, which was after the incorporation of San Pedro, and there is no showing that any payment was made before that date. All the other proceedings leading up to the patent in No. 144, and all the proceedings in swamp land location 3088 occurred after said incorporation. The patents for both these locations were issued on October 16, 1894. It follows that both patents are void because of the fact that the lands were reserved during the time when the proceedings for the sale took place.

[5] The defendants pleaded the bar of the statute of limitations contained in section 315 of the Code of Civil Procedure, which is as follows:

"The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

"1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or

"2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years."

The words "right or title" in the first subdivision must of necessity refer to the right or title of the state to sue, not to the right or title upon which the state bases its right to sue. If this were not so, the state could not maintain an action in respect to land to which it had held title for more than ten years prior to the beginning of the action, although the invasion of its rights which created the cause of action had been very recent and within ten years. This question was presented in *People v. Center*, 66 Cal. 564, and it was there held that the first clause should be construed as if it the cause of action had been very recent and within ten years, etc. We fully approve that decision and hold that to be the proper construction of the section.

The court found that a certain parcel of the land in controversy had been held and occupied by the Kerekhoff-Cuzner Mill and Lumber Company, adversely to the state and under claim of title
399 against it, continuously for more than ten years before the action was begun. Upon this finding it is contended that the action was barred by the aforesaid statute of limitations and that title by prescription has been acquired thereto by that company. This land, for the most part, is embraced in swamp land location 3088 and is above the line of ordinary high tide, being of the class described as swamp land. Some small portions of the land thus occupied and claimed is tide land.

Counsel for plaintiff, in argument, admit that the swamp lands of the state are proprietary lands, capable of being acquired by adverse possession, if there is no rule of law which prevents the operation of the statute of limitations against the state with reference to them. They contend, however, that the reservation of the land from sale operated as a dedication to public use, or as a

declaration that the lands are held in trust for public purposes, and that the statute of limitations does not run against the state with respect to land so dedicated or held, and, consequently, that the state cannot be dispossessed thereof by adverse possession. The court below took this view of the question. To sustain this point the plaintiff relies upon a passage from *Hoadley v. San Francisco*, 50 Cal. 275, to the effect that the land there claimed, being land granted by the United States to San Francisco for public use, was "held for that purpose only" and could not be conveyed to private persons, and that "the city having no authority to convey the title, private parties are virtually precluded from acquiring it". The argument from this case appears to be based upon the theory that the land there referred to was the entire body of land granted to San Francisco by the act of congress of July 1, 1864 (13 U. S. Stats. 333), proprietary in character and subject to sale by the city. A careful analysis of the case shows that this is not true. The land in litigation consisted of public squares which had been dedicated as such by the city and the state before the passage of the act of 1864. The congressional grant to the city of all the pueblo lands "for the uses and purposes specified in the ordinance of said city, ratified by an act of the legislature," recognized the previous dedication of these public squares to public use as such, and gave them to the city in trust for that purpose. It was these squares, so dedicated, of which the court was speaking in the passage relied on, and not the proprietary lands included in the grant. The decision does not hold that lands granted by the United States to the state for general public purpose, as for example the school lands granted in aid of general education or the swamp lands granted for reclamation and tillage or other private use, are withdrawn from commerce, or held in trust for public use. The grant in that case, being, in effect, a grant by the United States to the city for public use as a public square, created a public trust which the city having accepted could not revoke, and hence, it was held that the city could not be deprived of this public land by adverse possession or by the statute of limitations. It was a trust created by the holder of the paramount title. In the present case, the reservation was made by the state itself. The state could revoke the reservation at any time. It was a mere restriction upon a general power delegated to its officers. No public purpose or public use was declared. The swamp lands had not been previously dedicated to any public use. The reservation merely withheld them from sale. No dedication to public use is to be implied therefrom. The reservation left them in precisely the same condition as they were in before any law authorizing a sale was enacted, that is, as proprietary lands of the state subject to adverse possession and the running of the statute of limitations. (*Ames v. City of San Diego*, 101 Cal. 390; *San Diego v. Linda Vista Irr. Dist.*, 108 Cal. 196. Ordinarily, the mere possession of state lands of this character by one not in privity with the state, nor claiming under it, will not be adverse, so as to set the statute in motion. The state is deemed to acquiesce in such possession by private persons and it is con-

sidered as permissive only. This is the basis of section 1006 of the Civil Code. But this is not necessarily the case, and as the court found that possession in this case was adverse to the title of the state, and as that finding cannot be here reviewed, since it is in favor of the appellant, it must be assumed to be supported by sufficient evidence.

Counsel for appellants also advance the proposition that the presumption of an ancient grant is the basis of the doctrine of prescription and that there can be no such presumption where no grant could have been legally made. The code defines the method of gaining such title and does not declare that it must be based on the presumption of a grant. (Civ. Code, sec. 1007.) [6] The running of the statute of limitations does not depend upon the presumption of the existence of any grant. It operates upon the state, with respect to any property not dedicated or held for a public use, as soon as adverse possession thereof begins, without regard to the existence or presumed existence of a lawful grant. By the section cited an adverse occupancy for the period of limitation confers title to the property occupied, regardless of the possible existence of a previous grant. This, of course, applies, so far as the state is concerned, to proprietary land alone. It does not apply to property dedicated to public use. (See 46 Am. St. Rep., 492, note.) [7] We therefore hold that, as to the swamp lands which have been held in actual adverse possession for more than ten years claiming under a state patent, the action is barred by the provisions of section 315 of the Code of Civil Procedure.

[8] The defendants owning the swamp land claim littoral rights over the adjoining tide lands and waters, as owners of land riparian to the bay. It is unnecessary to discuss this claim at length. Such rights are no greater against the state than against the United States, with respect to the public easement for navigation held concurrently by the two sovereignties, the one for intrastate and general navigation, the other for interstate and foreign navigation. The private littoral rights of riparian proprietors are always subject and subordinate to the public easement for these purposes. (U. S. 401 v. Chandler-Dunbar Co., 33 Supreme Court Rep. 667; Gibson v. U. S., 166 U. S. 272; Scranton v. Wheeler, 179 U. S. 141; Gilman v. Philadelphia, 70 U. S. 725.)

[9] The part which is tide land is subject to the public uses of navigation and fishery, as is fully shown in the opinion in No. 3060. It is dedicated to the public uses. With respect to the public easement thus constituted, it is settled by a long line of decisions in this state that there can be no adverse possession sufficient to set in motion the statute of limitations against any action by the state or its authorized agencies to assert the public right or so as to give title by prescription to the adverse claimant against the public easement. This proposition was directly involved in *People v. Kerber*, 152 Cal. 733. It was there held that the public easement was not affected, impaired or destroyed by such adverse possession, no matter how long continued. We refer to the opinion in that case for a citation to the other cases in this state deciding the same proposition. Hence

it follows that the claim under the statute of limitations and to title by prescription cannot in any wise affect the right of the state or of the public to use the land for the public purposes connected with the aforesaid easements. (See also Civ. Code, sec. 3490, *Minin Debris* case, 9 Sawy. 513; *Schneider v. Hutchinson*, 76 Am. St. Rep., note, p. 492.)

[10] A question directly connected with the one last mentioned is presented by the peculiar facts of this case. It is a general principle that one who gains title to real property by adverse possession acquires all the title and estate in the land which was subject to acquisition in that manner. The conclusion in the case No. 3060 above mentioned with respect to these tide lands was that, although the laws for the sale of such lands did not authorize the disposition or destruction of the public easement, they nevertheless authorized the transfer to the patentee of the subordinate estate in the property subject to the public easement for navigation and fishery. Upon this suggestion arises that an adverse possession of the property sufficient to gain title by prescription would be effective to divest the state of title to this subordinate estate in the land, practically to the same extent as the patent issued under the tide land law, and, hence, that the defendants, by virtue of such adverse possession, have acquired the title to that subordinate estate. The writer of this opinion believes that this proposition is untenable and that the decision in *People v. Kerber* and the other cases cited in that case, and many other decisions in other states, establish the proposition that there can be no adverse possession of land dedicated to public use sufficient either to set in motion the statute of limitations or to acquire title to any interest therein by prescription. A majority of the court, however, do not accede to this view of the law. They hold that a continuous actual occupation of tide land, under claim of title against the state and adverse thereto, for the necessary statutory period, gives to such claimant a title by prescription to the fee therein, subject to the paramount right and title of the public and
402 of the state to use it for the public purposes of navigation and fishery, as more fully set forth in the opinion in the aforesaid case No. 3060. Accordingly, it is here held that the *Kerckhoff-Cuzner Mill and Lumber Company* has in this way acquired such subordinate title to the small parcels of tide land found by the court to be included in its actual adverse possession.

The conclusions reached by the court in respect to this case are that all the patents are invalid, but that with respect to the swamp land held adversely by the *Kerckhoff-Cuzner Mill and Lumber Company* the action is barred by the statute of limitations, and that with respect to the subordinate estate in the tide lands so held by that company subject to the public easements for navigation and fishery, the action is also barred by the statute of limitations. The findings state with sufficient certainty the facts upon which the judgment must rest. There seems to be no substantial dispute as to the essential facts and another trial is unnecessary. We can by our mandate direct the court below to enter the proper judgment. As to the small parcels of tide lands found to have been adversely pos-

versed by the Kerckhoff-Cuzner Mill and Lumber Company the judgment should be that the said company has no title thereto, so far as the public easements of navigation and fishery are concerned, but that said company is the owner of the servient estate, subject, however, to said public easements and to the right and power of the state, or its authorized agents, at any time to lay out, alter and improve the same for said public uses and for access thereover to navigable waters, and to the right of the public to use the same for said purposes as the proper public authority may direct. As to the swamp land so adversely held by that company, the judgment should be that said company is the owner in fee thereof.

It is ordered that the judgment against the Kerckhoff-Cuzner Mill and Lumber Company be vacated and that the court below proceed, upon the findings it has heretofore made in this action, to enter the judgment of the court declaring, in accordance with this opinion, the interest and title of the plaintiff and of the Kerckhoff-Cuzner Mill and Lumber Company, respectively, to the swamp land and tide land, respectively, which that company had held in adverse possession for more than ten years before the action was begun.

The order denying a new trial is affirmed. As to all the defendants, except the Kerckhoff-Cuzner Mill and Lumber Company, the judgment is affirmed.

SHAW, J.

We concur:

ANGELLOTTI, J.

SLOSS, J.

BEATTY, C. J.

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L. A. No. 3061. In Bank.

December 20, 1913.

PEOPLE OF THE STATE OF CALIFORNIA et al., Plaintiffs and Respondents,

v.

BANNING COMPANY, MARY H. BANNING, LUCY T. GREENLEAF, Mary H. Norris, Kerckhoff-Cuzner Mill and Lumber Company, California Pacific Railway Company, Los Angeles Harbor Company, Imperial Investment Company, Defendants and Appellants.

[1] Swamp and Overflowed Lands—Adverse Possession for Ten Years—Action to Quiet Title by State—Bar of Statute of Limitations.—An action by the state to quiet title to swamp and overflowed lands which have been held in actual adverse possession against it for more than ten years, is barred by the statute of limitations.

[2] Id.—Tide Lands—Adverse Possession—Title Subject to Public Easements.—Adverse possession of tide lands for the statutory period gives title to the land subject to the public easements.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellants—O'Melveny, Stevens & Millikin; Gibson, Dunn & Crutcher; J. W. McKinley, Frank Karr, Ward Chapman, Lloyd W. Moultree. (Sheldon Borden, Edward E. Bacon, W. R. Millar, of Counsel.)

For Respondents—U. S. Webb, Attorney-General; Leslie W. Shenk, A. P. Fleming, Anderson & Anderson.

The appeals are from the judgment and from an order denying a new trial. The appeal of the Kerckhoff-Cuzner Mill and Lumber Company is taken separately from that of the others, but both appeals are presented upon the same transcript.

The case involves the land embraced in tide land location No. 68. First payment was made in 1882 and the last in the year 1890. The patent was issued therefor to William H. Banning on October 16, 1894. It is all within two miles of Wilmington.

The action is to quiet title to the entire tract of land embraced in the patents. A part of the land embraced in this location was involved in L. A. No. 3077, *People v. Banning et al.* All the questions determinative of the rights of the parties were fully discussed and decided in that case and in L. A. No. 3060, *People v. California Fish Co.* The court here, as it did in L. A. No. 3077, found that certain of the lands claimed by the Kerckhoff-Cuzner Mill and Lumber Company had been held by said company in actual adverse possession against the state for more than ten years and that said lands are a part of the swamp and overflowed lands of the state, lands held as proprietary lands and not subject to any public easement or trust. [1] Our conclusion in the first named case was that the action was barred by the statute of limitations as against that company. [2] The court below also found that a certain small portion of the land held in adverse possession by the Kerckhoff-Cuzner Mill and Lumber Company was tide land and it concluded that that defendant had gained no title whatever thereto by virtue of its adverse possession. In the opinion in L. A.

No. 3077 aforesaid we hold that said company, by that means, acquired title to the land subject to the public easements. That decision applies here also and the decision will be to the same effect. The writer of this opinion yields to the majority of the court on this point, although he does not agree to the doctrine. The judgment here will follow the judgment in said first named case.

It is therefore ordered that the judgment against all the defendants except the Kerckhoff-Cuzner Mill and Lumber Company, and the order denying a new trial as to all, be affirmed.

The judgment against the Kerckhoff-Cuzner Mill and Lumber Company is reversed and as to that company the cause is remanded with directions to the court below to enter judgment that the plaintiff take nothing against the said defendant with respect to the land which the court in the eleventh finding declared to have been in the

possession of said defendant for more than ten years next before the beginning of this action and to be above the line of ordinary high tide, and that said defendant remain in possession thereof, and further that the Kerckhoff-Cuzner Mill and Lumber Company is the owner of the land below the line of ordinary high tide, of which it is found to have had such adverse possession, but that its right, title and estate therein is subject to the public easement of navigation and fishery, and to the right and power of the state, or its authorized agencies, at any time to lay out, alter and improve the same for said public uses and for access to navigable waters, and to the right of the public to use the same for said purposes as the proper public authority may direct, and for its costs.

SHAW, *J.*

We concur:

ANGELLOTTI, *J.*

SLOSS, *J.*

BEATTY, *C. J.*

L. A. No. 3078. In Bank.

December 20, 1913.

PEOPLE OF THE STATE OF CALIFORNIA, etc., Plaintiffs and Respondents,

v.

BANNING COMPANY, Defendant and Appellant.

[1] Tide Lands—Lands Lying Within Two Miles of Incorporated Town—Approval of Application and First Payment Prior to Filing Certified Copy of Incorporation With Secretary of State—Valid Patent.—A patent issued for tide lands lying within two miles of an incorporated town is valid as to the fee, where the application and survey has been filed and approved and the first installment of the price paid, prior to the filing with the secretary of the state of the order declaring the territory incorporated as required by the general law of 1883, notwithstanding that the returns of the election had been canvassed and the order declaring the territory incorporated made, prior to such payment.

[2] *Id.*—Municipal Corporations—Incorporation of City Under General Law.—The incorporation of a city is a legislative act, and is none the less an act of legislation because of the fact that it is done in pursuance of an election by the people and under a general law, in which latter event it becomes complete when the certified
405 copy of the order of incorporation is filed in the office of the secretary of state.

[3] *Id.*—Constitutional Law—Application for Lands not Reserved from Sale—First Payment—Subsequent Withdrawal from Sale Unwarranted.—Where a valid application and survey for the purchase of state lands not reserved from sale has been filed and approved and the first payment of the price paid, the purchaser

acquires a vested right in the land and the state cannot thereafter by a statute withdrawing such lands from sale, impair the obligation of its contract.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellant—Gibson, Dunn & Crutcher; J. W. McKinley, Frank Karr, Ward Chapman. (Ward Chapman, Sheldon Borden, Edward E. Bacon, W. R. Millar, of Counsel.)

For Respondents—U. S. Webb, Attorney-General; Leslie R. Hewitt, John W. Shenk, A. P. Flemming, Anderson & Anderson.

(Amici Curiae for Appellants—Fitzgerald, Abbott & Beardsley.)

The defendant appeals from the judgment and from an order denying a new trial.

The action was begun to obtain a decree adjudging that plaintiff is the owner of the land embraced in two tide land locations, numbered respectively 152 and 153, for which patents have been issued by the state officers and declaring that the claims of the defendant under said patents are invalid. Judgment below was given for the plaintiff.

All of the land is situated within two miles of the corporate limits of the town of Wilmington as incorporated by the act of 1872. (Stats. 1872, 108.) This act was repealed on March 12, 1887, and said incorporation thereupon ceased to exist. Tide land location 152 includes 345.12 acres, and tide land location 153 includes 51.12 acres. The proceedings for the purchases were taken on the same dates. The applications and surveys were approved on February 9, 1888, the first payments of one-fifth of the price were made on February 28, 1888, the certificates of purchase were issued on March 8, 1888, final payments were made on February 1, 1902, and the patents were executed on February 5, 1902. Patent for No. 152 was issued to William Banning and that for No. 153 to J. B. Banning. The defendant has succeeded to all the title of the said patentees.

Proceedings for the incorporation of the city of San Pedro under the general law of 1883 were pending on February 9, 1888, when the aforesaid applications and surveys were approved. The act of 1883 provides that, after canvassing the returns of the election, if a majority is found to favor incorporation, the supervisors shall "by an order entered upon their minutes declare such territory duly incorporated, and that they shall thereupon cause a duly certified copy of the order to be filed in the office of the secretary of state, and from and after the date of such filing such incorporation shall be deemed complete." The votes were canvassed and the order declaring the territory incorporated as the city of San Pedro was duly entered on the minutes on February 27, 1888. The certified copy of

that order was not filed with the secretary of state until March 406 1, 1888. The first payment for these lands, amounting to \$79.25 in all, it will be noted, was paid in this short interval, that is, on February 28, 1888.

The land is situated within two miles of the corporate limits of the city of San Pedro as fixed by said order of incorporation. Upon such incorporation, the constitutional prohibition took effect and all lands within that distance of the city were thereupon immediately "withheld from grant or sale." The reservation in section 3488 of the Political Code also became immediately effective. It is conceded that the making of the order and entering it upon the minutes of the board did not legally perfect the incorporation and that it was not constituted a legally incorporated city under the law, until the copy of the order was filed in the office of the secretary of state. It thus appears that at the time the applications and surveys were filed and approved and when the first payment on each was made, the land was free from the reservation in the code and from the prohibition in the constitution and was open to sale under the law, subject to the public easement for navigation and fishery, as explained in *People v. California Fish Co.*, L. A. No. 3060, in which the effect of such sale upon the public easement is elaborately discussed, and to which we refer for a fuller statement thereof. The question presented in this case is whether or not the filing of the application and survey, its approval by the proper officer and the payment and acceptance of one-fifth of the price fixed by law, prior to the incorporation of San Pedro, constituted a legal and binding contract of sale for the interest authorized to be sold which bound the state to complete the sale as if the prohibition had not taken effect.

[2] The incorporation of a city is a legislative act. (See authorities cited in *People v. California Fish Co.*, L. A. No. 3060, *supra*). It is none the less an act of legislation because of the fact that it is done in pursuance of an election by the people and under a general law. The legislative act, under the general law, becomes complete when, by the filing of the certified copy of the order of incorporation, the creation of the new city becomes complete and perfect. The filing of the copy of the order and the resulting incorporation of the city is the equivalent of the passage of a law, within the meaning of the provisions of the constitutions of this state and of the United States forbidding the passage of a law impairing the obligation of a contract. (Cal. Const., art. 1, sec. 16; U. S. Const., art. 1, sec. 10.) The situation is therefore the same as if the state, after receiving the first payment for this land, had enacted a statute forbidding the completion of the proposed purchase or withdrawing the land from sale. [3] In *Pennoy v. McConnaughy*, 140 U. S. 24, the Supreme Court of the United States held that where a valid application and survey for the purchase of swamp land had been filed and approved and the first installment of the price had been paid, the purchaser thereby acquired a vested right in the land, and the contract of sale to him became a valid subsisting contract, which the state could not, by a subsequent statute, declare void and could not refuse to perform. A similar principle was announced in this state in *People v. Bryan*, 73 Cal. 376, where it was held that where swamp land was open to purchase and a buyer had paid the price and obtained a patent, the state could not, in equity, have the patent cancelled because of a defect in the application, without first offering

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to return the purchase money, if the purchaser had proceeded in good faith. (See also *People v. Morris*, 77 Cal. 208; *United States v. White*, 9 Sawyer 131.) [1] These authorities establish the proposition that a patent issued under such circumstances is valid to convey the title of the state which was open to sale at the time the installment of the purchase money was paid. As we have seen in the case of *People v. California Fish Co.*, L. A. No. 3060 aforesaid, this title under the law for the sale of tide lands in this state extends only to the soil beneath the waters, and it is subject to the public easements for navigation and fishery. The judgment of the court below declaring the patent entirely void was therefore erroneous.

All the other points involved in the case are fully discussed and determined in *People v. California Fish Co.*, *supra*. The facts necessary to a proper judgment in this case are set forth in the findings. The error can be corrected by a direction to the court below to enter the proper judgment and a new trial is unnecessary.

The order denying a new trial is affirmed.

The judgment is reversed, the cause is remanded and the court below is directed to make and enter its judgment upon the findings as follows:

It is ordered, adjudged and decreed that, except as hereinafter stated, the defendant is the owner of the two parcels of land situated in the county of Los Angeles, state of California, described as follows, to-wit: (1) the parcel of land known as tide land location No. 152, containing 345.12 acres and fully described in the patent issued by the state of California to William Banning, dated February 26, 1902, and recorded in book 9 of patents, page 274, of the records of Los Angeles county, to which reference is made for further description, it being the same land more particularly described in the first count of the complaint herein; (2) the parcels of land known as tide land location No. 153, containing 51.12 acres and fully described in the patent issued by the state of California to Joseph B. Banning, dated February 26, 1902, and recorded in book 9 of patents, page 271, of the records of Los Angeles county, to which reference is made for further description, it being the same land more particularly described in the second count of the complaint herein. But the said parcels of land are hereby declared to be subject to the public easements for navigation and fishery, and the state of California is declared to be the owner of all interest and title therein necessary to the support of said easements.

SHAW, J.

We concur:

ANGELLOTTI, J.

SLOSS, J.

BEATTY, C. J.

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L. A. No. 3079. In Bank.

December 20, 1913.

THE PEOPLE OF THE STATE OF CALIFORNIA, upon Information of
U. S. Webb, Attorney-General, Plaintiff and Respondent,

v.

SOUTHERN PACIFIC RAILROAD COMPANY and SOUTHERN PACIFIC
COMPANY, Defendants and Appellants.

[1] Tide Lands—Ownership of Adjoining Upland—Littoral Rights to Tide Lands.—When a riparian proprietor holds title to the soil under the water in front of his upland, and holds it by virtue of his riparian ownership, in fee, such title is subject to the public easements of navigation and fishery, and when the public authorities see fit to make improvements on the land below high water mark for purposes of navigation, the riparian owner must yield thereto, and his right is subordinate to the public rights.

Appeal from the Superior Court of Los Angeles County—Walter Bordwell, Judge.

For Appellants—Gibson, Dunn & Crutcher; J. W. McKinley, Frank Karr, Ward Chapman. (Ward Chapman, Sheldon Borden, Edward E. Bacon, W. R. Millar, of Counsel.)

For Respondent.—U. S. Webb, Attorney-General; Leslie R. Hewitt, John W. Shenk, A. P. Fleming, Anderson & Anderson.

The defendants appeal from the judgment and from the order denying a new trial.

The action was begun to establish the title of the state of California to a parcel of land embraced in what is known as tide land location No. 143 for which the state issued a patent to August W. Timms under the laws for the sale of swamp and tide lands. It is alleged that the defendants claim some title or interest in said land. The patent to Timms was issued on December 3, 1887. The proceedings leading up to the execution of said patent were in all respects regular. The land is more than two miles from the corporate limits of the town of Wilmington, as fixed by the act of 1872 incorporating that town. At the time the proceedings for the sale were taken and when the patent was issued, the city of San Pedro had not been incorporated. The land was therefore open to sale and not within any statutory or constitutional reservation.

The effect of such patent for tide lands, with respect to the public easements of navigation and fishery, was fully discussed and determined in the opinion in the case of *People v. California Fish Co.*, L. A. No. 3060, to which we refer. It was there decided that it does not convey or affect the public rights of navigation and fishery, or the power of the state to regulate and control the same and alter and improve the premises in the interest of navigation, but transferred only the title to the soil subject to said public rights and powers. The judgment below was that the plaintiff was the absolute owner of the land and that the said patent was void and conveyed no interest in the land whatever. In this the court erred.

The decree as to the effect of the patent should have been to the effect above stated.

The findings do not show that the defendants have succeeded to the interest of Timms under the patent aforesaid. Upon the trial there was an oral stipulation to that effect, but it was not 409-413 carried into the findings. They do not show that the defendants have any title or interest under the patent. By reason of this omission the error in the judgment cannot be corrected by a direction from this court to enter the judgment without further proceedings. This court cannot supply the finding.

[1] The defendants have a parcel of upland adjoining the tide lands in controversy and they claim the right, as riparian proprietors, to wharf out and use the tide land in front of their upland for navigation in connection with the upland. It is settled by the decision of the Supreme Court of the United States in the case of *United States v. Chandler-Dunbar W. P. Co.*, 33 Sup. Ct. Rep. 667, decided May 26, 1913, that when the riparian proprietor holds title to the soil under the water in front of his upland, and holds it by virtue of his riparian ownership, in fee, such title is subject to the public easements of navigation and fishery, that when the public authorities see fit to make improvements on the land below high water mark for purposes of navigation, the riparian owner must yield thereto, and that his right is subordinate to the public rights. There are many other decisions of the Supreme Court of the United States substantially to the same effect. Under these authorities it is apparent that the littoral rights of the defendants cannot impinge upon the control by the state of tide lands for the public purposes of navigation and fishery, or affect the public easement for those purposes.

Certain rights of the defendants under a permit from the state surveyor-general, under section 478 of the Civil Code, dated April 7, 1887, and under an agreement with the city of San Pedro made on December 11, 1886, were expressly excepted from the operation of the judgment and were not adjudicated.

A new trial of all the issues is unnecessary. The only fact not determined is the succession of the defendants to the rights of Timms under the state patent. The case in this respect is similar to the case of *People v. Southern Pacific Railroad Co.*, L. A. No. 3056, decided simultaneously herewith, and the order will be similar. That case also disposes of the claim of title by prescription.

The order denying a new trial is affirmed, except as below stated.

The judgment is reversed with directions to the court below to proceed upon evidence to be taken, or upon a consideration of the aforesaid stipulation, and make a finding upon the question whether or not the defendants have succeeded to the rights of Timms, under the patent from the state to him, and thereupon to make and enter its judgment accordingly.

SHAW, J.

We concur:

ANGELLOTTI, J.

SLOSS, J.

BEATTY, C. J.

414 In the Supreme Court of the State of California.

L. A. 3057.

PEOPLE, etc.,

v.

BANNING Co. et al.

By the COURT:

Rehearing denied, January 19, 1914.

415 In the Supreme Court of the State of California.

L. A. No. 3057.

THE PEOPLE OF THE STATE OF CALIFORNIA, upon Information of
U. S. WEBB, Attorney General, Plaintiff and Respondent,

vs.

BANNING COMPANY, a Corporation; MARY H. BANNING, LUCY T. Greenleaf, and Mace Greenleaf, Her Husband; Mary H. Norris, Hancock Banning, Pacific Electric Railway Company, a Corporation; Los Angeles Harbor Company, a Corporation, and Imperial Investment Company, a Corporation, Defendants and Appellants.

Petition for Writ of Error.

Considering themselves aggrieved by the final judgment and decree of the Supreme Court of the State of California rendered against them in the above entitled cause, as will more fully appear from the Assignment of Errors exhibited herewith, Banning Company, Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company, defendants and appellants in said cause, hereby pray that a Writ of Error may issue, and that they may be allowed to bring up for review before the Supreme Court of the United States the judgment and decree of said Supreme Court of the State of California in the above entitled cause; and for the purposes of said Writ of Error, these defendants and appellants having given due notice to their co-defendants and appellants in said cause, Los Angeles Harbor Company, a corporation, and Imperial Investment Company, a corporation, of their intention to petition for such Writ of Error, and having requested their said co-defendants and appellants to join therein, and they having refused so to do, as will more fully appear from their written stipulation hereto annexed, marked "Exhibit A", these defendants and appel-

416 lants ask for a severance from their said co-defendants and appellants, Los Angeles Harbor Company and Imperial Investment Company.

JAS. A. GIBSON,
J. W. McKINLEY &
FRANK KARR,
WARD CHAPMAN,

*Attorneys for Defendants and Appellants
Banning Company, Mary H. Banning,
Lucy T. Greenleaf, Mary H. Norris, Han-
cock Banning, and Pacific Electric Rail-
way Company.*

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EXHIBIT A.

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, upon Information of
U. S. WEBB, Attorney General, Plaintiff and Respondent,
vs.

BANNING COMPANY, a Corporation; MARY H. BANNING, LUCY T.
Greenleaf, and Mace Greenleaf, Her Husband; Mary H. Norris,
Hancock Banning, Pacific Electric Railway Company, a Corpora-
tion; Los Angeles Harbor Company, a Corporation, and Imperial
Investment Company, a Corporation, Defendants and Appellants.

Refusal to Join in Writ of Error.

Come now the Los Angeles Harbor Company, a corporation, and
Imperial Investment Company, a corporation, two of the defendants
and appellants in the above entitled cause, and hereby acknowledge
due notice and request by all of our co-defendants and co-appellants
in said cause, to join in petitioning for and prosecuting a Writ of
Error from the Supreme Court of the United States to the Supreme
Court of the State of California to review the final judgment made
and entered in said cause on the 20th day of December, 1913, and we
hereby refuse to join therein, and hereby stipulate and consent that
our said co-defendants and co-appellants, namely, Banning Com-
pany, a corporation, Mary H. Banning, Lucy T. Greenleaf, Mace
Greenleaf, her husband, Mary H. Norris, Hancock Banning and
Pacific Electric Railway Company, a corporation, may petition for
and prosecute said Writ of Error for the review of said judgment by
the Supreme Court of the United States, without making us,
418 or either of us parties thereto, either as plaintiffs in error or
as defendants in error.

LLOYD W. MOULTRIE,

*Attorneys for Defendants and Appellants Los Angeles
Harbor Company and Imperial Investment Company.*

419 In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, upon Information of
U. S. WEBB, Attorney General, Plaintiff and Respondent,

vs.

BANNING COMPANY, a Corporation; MARY H. BANNING, LUCY T. Greenleaf, and Mace Greenleaf, Her Husband; Mary H. Norris, Hancock Banning, Pacific Electric Railway Company, a Corporation; Los Angeles Harbor Company, a Corporation, and Imperial Investment Company, a Corporation, Defendants and Appellants.

Order Allowing Writ and Fixing Bond.

Upon reading the foregoing petition of Banning Company, Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company, defendants and appellants in the above entitled cause, it is ordered that a Writ of Error issue as therein prayed, upon the execution of a bond by said defendants and appellants to the People of the State of California, plaintiff and respondent in said cause, in the sum of one thousand Dollars, such bond, when approved, to act as a supersedeas.

It appearing that Mace Greenleaf, one of the defendants and appellants in said cause, has died subsequent to the taking of the appeal therein to this court, and it further appearing that defendants and appellants Los Angeles Harbor Company, a corporation, and Imperial Investment Company, a corporation, after due notice and request, have refused to join their co-defendants and co-appellants above named in their petition for said Writ, a severance, pursuant to the request of the last mentioned defendants and appellants, is accordingly ordered, and the right to further proceed separately is hereby granted.

Dated February 2nd, 1914.

W. H. BEATTY,

*Chief Justice of the Supreme Court
of the State of California.*

420 [Endorsed:] No. L. A. No. 3057. Dept. No. —. In the Supreme Court of State of California. The People of the State of California, upon Information of U. S. Webb, Attorney General, Plaintiff and Respondent, vs. Banning Company, et al., Defendants and Appellants. Petition for Writ of Error and Allowance. Filed Feb. 3 1914. B. Grant Taylor, Clerk, By — — —, Deputy. Gibson, Dunn & Crutcher, Entrance Room 718, Pacific Electric Building, Cor. 6th and Main Sts., Los Angeles, Cal., Attorneys for Defendants and Appellants.

In the Supreme Court of the United States.

BANNING COMPANY, a Corporation; MARY H. BANNING, LUCY T. Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, a Corporation, Plaintiffs in Error,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA upon Information of U. S. WEBB, Attorney General, Defendants in Error.

Assignment of Errors and Prayer for Reversal.

Now come Banning Company, a corporation, Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, a corporation, plaintiffs in error in the above entitled cause, and file herewith their petition for a Writ of Error, and say that there are errors in the records and proceedings in said cause in the Supreme Court of the State of California, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following Assignment of Errors:

I.

The Supreme Court of the State of California erred in holding and deciding that no contract was created or arose prior to the taking effect of the Constitution adopted by the people of the State of California in the year 1879, between the State of California and Phineas Banning, predecessor in interest of these defendants, by the application and proceedings made and taken by said Phineas Banning for the purchase of the lands in controversy in this suit, under and in conformity to the Act of the Legislature of the State of California, entitled "An Act to provide for the sale of certain lands belonging to the State," approved on the 27th day of April, 422 1863, and by the judgment rendered in favor of said Phineas Banning by the District Court of the State of California, on or about the 26th day of November, 1879, in the suit brought in said court upon the reference to said District Court of the contest of said application to purchase by the Surveyor General of the State of California, as set forth in the answers of these plaintiffs in error as defendants in the above entitled cause, filed in the Superior Court of the State of California in said cause, and in the evidence introduced on behalf of these plaintiffs in error as such defendants in the trial of said cause; and in holding and deciding that the obligations of the contract created by said application and proceedings to purchase and said judgment of the District Court were not, by the judgment made and entered in this cause by said Superior Court, allowed and adjudged to be impaired and abrogated by laws passed by the State of California subsequent to the creation of said contract, contrary to the provisions of Article I, Section 10, of the Constitution of the United States; and in holding and deciding that said subsequent laws passed by the State of California, impairing and abrogating the obligations of said contract, were valid and not repugnant to said provisions of the Constitution of the United States.

II.

Said Supreme Court of the State of California erred in holding and deciding that no contract was created or arose prior to the taking effect of said Constitution adopted by the people of the State of California in the year 1879, between the State of California and Phineas Banning, predecessor in interest of the defendants by the application and proceedings made and taken by said Phineas Banning for the purchase of said lands in controversy in this suit, under and in conformity to said Act of the Legislature of the State of

California, approved April 27th, 1863, and the Act of said
423 Legislature entitled "An Act to provide for the management and sale of the lands belonging to the State," approved on the 28th day of March, 1868, and the acts amendatory thereof and supplemental thereto, and by the said judgment rendered by the said District Court on or about the 26th day of November, 1879, as set forth in said answers and evidence in said Superior Court in this cause; and in holding and deciding that the obligations of the contract created by said application and proceedings to purchase and said judgement of the District Court were not, by the judgment made and entered in this cause by said Superior Court, allowed and adjudged to be impaired and abrogated by laws passed by the State of California subsequent to the creation of said contract, contrary to the provisions of Article I, Section 10, of the Constitution of the United States; and in holding and deciding that said subsequent laws passed by the State of California, impairing and abrogating the obligations of said contract, were valid and not repugnant to said provisions of the Constitution of the United States.

III.

Said Supreme Court of the State of California erred in holding and deciding that no contract was created or arose prior to the taking effect of said constitution adopted by the people of the State of California in the year 1879, between the State of California and Phineas Banning, predecessor in interest of the defendants, by the application and proceedings made and taken by said Phineas Banning for the purchase of said lands in controversy in this suit, under and in conformity to said Act of the Legislature of the State of California, approved April 27, 1863, and said Act of said Legislature approved March 28th, 1868, and the acts amendatory thereof and supplemental thereto, and the Political Code of the State of California, as enacted by said legislature, and approved March 12th, 1872, and by said judgment of said District Court rendered on or
about the 26th day of November, 1879, as set forth in the

424 answers of these plaintiffs in error as defendants in the above entitled cause, filed in the Superior Court of the State of California in said cause, and in the evidence introduced on behalf of these plaintiffs in error as such defendants in the trial of said cause; and in holding and deciding that the obligations of the contract created by said application and proceedings to purchase and said judgment of the District Court were not, by the judgment made

and entered in this cause by said Superior Court, allowed and adjudged to be impaired and abrogated by laws passed by the State of California subsequent to the creation of said contract, contrary to the provisions of Article I, Section 10, of the Constitution of the United States; and in holding and deciding that said subsequent laws passed by the State of California, impairing and abrogating the obligations of said contract, were valid and not repugnant to said provisions of the Constitution of the United States.

IV.

Said Supreme Court of the State of California erred in holding and deciding that the State of California was not permitted to and did not, in and by the necessary force and effect of said judgment of said Superior Court in this cause, deprive these plaintiffs in error of their property without due process of law, contrary to the provisions of Section 1, of the Fourteenth Amendment to the Constitution of the United States.

V.

Said Supreme Court of the State of California erred in holding and deciding that the State of California was not permitted to and did not, in and by the necessary force and effect of said judgment of said Superior Court in this cause, deny to these plaintiffs in error the equal protection of the laws, contrary to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

425

VI.

Said Supreme Court of the State of California erred in holding and deciding that the property of these plaintiffs in error was not, in and by the necessary force and effect of the said judgment of the said Superior Court of the State of California, in this cause, taken for public use without compensation, contrary to the provisions of the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment thereto.

For the errors aforesaid these plaintiffs in error pray that the final judgment of the Supreme Court of the State of California, made and rendered in this cause on the 20th day of December, 1913, be reversed, and a judgment rendered in favor of said plaintiffs in error, and for costs.

JAS. A. GIBSON,
J. W. McKINLEY &
FRANK KARR,
WARD CHAPMAN,

Attorneys for Plaintiffs in Error.

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[Endorsed:] No. L. A. 3057. Dept. No. —. In the Supreme Court of the United States, State of California. Banning Company et al., Plaintiffs in Error, vs. The People of the State

of California ex rel., Defendants in Error. Assignment of Errors and Prayer for Reversal. Filed Feb. 2, 1914. B. Grant Taylor, clerk, by ———, deputy. Gibson, Dunn & Crutcher, entrance Room 718, Pacific Electric Building, cor. 6th and Main sts., Los Angeles, Cal., Attorneys for Plaintiffs in Error.

427

Original.

In the Supreme Court of the State of California.

L. A. 3057.

THE PEOPLE OF THE STATE OF CALIFORNIA upon Information of
U. S. WEBB, Attorney General, Plaintiff and Respondent,
vs.
BANNING COMPANY et al., Defendants and Appellants.

Stipulation.

It is hereby stipulated by and between the parties to the said action that defendant Mace Greenleaf, husband of the defendant Lucy T. Greenleaf, has died; that he had no interest in the subject matter of said action, but was joined as a nominal party thereto as the husband of said Lucy T. Greenleaf.

And that said action may continue as to said defendant Lucy T. Greenleaf, without substituting any one in place of said decedent.

ANDERSON & ANDERSON,
U. S. WEBB, *Att'y Gen'l*,
Attorneys for Plaintiff & Respondent.
JAS. A. GIBSON,
GIBSON, DUNN & CRUTCHER,
J. W. MCKINLEY, AND
FRANK KARR,
WARD CHAPMAN,
Attorneys for Defendants & Appellants.

428 [Endorsed:] Original. No. L. A. 3057. Dept. No. —.
In the Supreme Court of the State of California. The People of the State of California, etc., Plaintiff & Respondent, vs. Banning Company et al., Defendants & Appellants. Stipulation. Filed Feb. 2, 1914. B. Grant Taylor, Clerk, by Erb, Deputy. Gibson, Dunn & Crutcher, entrance Room 718, Pacific Electric Building, cor. 6th and Main sts., Los Angeles, Cal., Attorneys for def'ts & App'l'ts.

429

Original.

In the Supreme Court of the State of California.

L. A. 3057.

THE PEOPLE OF THE STATE OF CALIFORNIA upon Information of
U. S. WEBB, Attorney General, Plaintiff and Respondent,
vs.
BANNING COMPANY et al., Defendants and Appellants.

Stipulation.

The Plaintiff and Respondent in the above entitled action hereby stipulates that the bond for costs and supersedeas upon Writ of Error in said cause to the Supreme Court of the United States, prosecuted by the defendants and appellants in said cause, or any of them, may be fixed by the court at the sum of \$1,000.00.

U. S. WEBB, *Att'y Gen'l*;
ANDERSON & ANDERSON,
Attorneys for Plaintiff and Respondent.

430 [Endorsed:] No. L. A. 3057. Dept. No. —. In the Supreme Court of State of California. The People of the State of California ex Rel., Plaintiff and Respondent, vs. Banning Company et al., Defendants and Appellants. Stipulation. Filed Feb. 2, 1914. B. Grant Taylor, Clerk, by Erb, Deputy. Gibson, Dunn & Crutcher, entrance Room 718, Pacific Electric Building, cor. 6th and Main sts., Los Angeles, Cal., Attorneys for Defendant and —.

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Copy.

In the Supreme Court of the United States.

BANNING COMPANY, a Corporation; MARY H. BANNING, LUCY T. Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, a Corporation, Plaintiffs in Error,
vs.

THE PEOPLE OF THE STATE OF CALIFORNIA upon Information of
U. S. WEBB, Attorney General, Defendant in Error.

Bond.

Know all men by these presents: That we, Banning Company, a corporation, Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, a corporation, the plaintiffs in error in the above entitled cause, as Principals, and Gerald Fitzgerald and P. N. Crowell, as Sureties, are held and firmly bound unto the People of the State of California, the

defendant in error in said cause, in the sum of One Thousand Dollars (\$1,000.00), to be paid to said defendant in error, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 31st day of January, 1914.

Approved as to form.

ANDERSON & ANDERSON,
Att'ys for Resp'd'ts.

Whereas, the above named plaintiffs in error seek to prosecute their Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above mentioned cause by the Supreme Court of the State of California.

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute said Writ of Error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation
432 to be void, otherwise to remain in full force and effect.

This bond and undertaking is given and made on behalf of all of the plaintiffs in error above named, and is and shall be binding upon each and all of said plaintiffs in error and said sureties above named, jointly and severally, although these presents may not be executed by all of said plaintiffs in error.

[Seal Banning Company, Incorporated Oct. 19th, 1894.]

BANNING COMPANY,
HANCOCK BANNING,
2d Vice-President, and
DAVID P. FLEMING, *Secretary.*

[Seal Pacific Electric Railway Company, Los Angeles, Cal.,
Incorporated Sept. 1, 1911.]

PACIFIC ELECTRIC RAILWAY
COMPANY,
By PAUL BROWN, *President, and*
W. A. CULLADERY, *Secretary.*
GERALD FITZGERALD,
P. N. CROWELL.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Gerald Fitzgerald and P. N. Crowell, the sureties whose names are subscribed to the foregoing undertaking, being severally duly sworn, each for himself, says that he is a resident and householder within the State of California, and is worth the sum for which he becomes surety on said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

GERALD FITZGERALD,
P. N. CROWELL.

Subscribed and sworn to before me, this 31st day of January, 1914.

[Seal of Neva S. Bedall, Notary Public, Los Angeles Co., Cal.]

NEVA S. BEDALL,
*Notary Public in and for the County of
Los Angeles, State of California.*

Bond approved and to operate as a supersedeas.
Dated February 2d, 1914.

W. H. BEATTY,
*Chief Justice of Supreme Court,
State of California.*

433 [Endorsed:] No. L. A. 3057. Dept. No. —. In the Supreme Court of the United States. Banning Company, a corporation et al., Plaintiffs in Error, vs. The People of the State of California upon Information, etc., Defendants in Error. Bond. Filed Feb. 2, 1914. B. Grant Taylor, Clerk, by — — —, Deputy. Gibson, Dunn & Crutcher, entrance Room 718, Pacific Electric Building, cor. 6th and Main sts., Los Angeles, Cal., Attorneys for Plaintiffs in Error.

434 L. A. 3057. Original.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the People of the State of California, upon the Information of U. S. Webb, Attorney General, as Plaintiff, and Banning Company, a corporation, Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, a corporation, as defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitu-

tion, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Banning Company, Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties
 435 aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 2d day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
*Clerk of the District Court of the United States,
 Northern District of California.*

Allowed, February 2nd, 1914.

W. H. BEATTY,
*Chief Justice, Supreme Court of the
 State of California.*

Filed Feb. 2, 1914. B. Grant Taylor, Clerk, by — Erb, Deputy.

436 [Endorsed:] Original. Filed Feb. 2, 1914. B. Grant Taylor, Clerk, by — Erb, Deputy.

437 Original.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the People of the State of California, and to U. S. Webb, the Attorney General of said State, Greeting:

You are hereby cited and admonished to appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Cali-

fornia, wherein Banning Company, a corporation, Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric Railway Company, a corporation, are plaintiffs in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of California, this 2nd day of February, 1914.

W. H. BEATTY,
*Chief Justice Supreme Court of the
State of California.*

Attest:

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk Supreme Court of the State of California.

438 SAN FRANCISCO, CALIFORNIA, February 2nd, 1914.

We, attorneys of record for the defendant in error in the foregoing entitled cause, hereby acknowledge due service of the foregoing Citation, and enter an appearance in the Supreme Court of the United States.

U. S. WEBB,
Attorney General of the State of California.
ANDERSON & ANDERSON,
*Attorneys for the People of the State of
California, Defendant in Error.*

Filed Feb. 2, 1914. B. Grant Taylor, Clerk, by — Erb,
Deputy.

439 SUPREME COURT OF THE STATE OF CALIFORNIA, ss:

I, B. Grant Taylor, Clerk of the above entitled Court, do hereby certify that the foregoing documents, to wit: Transcript on Appeal, Opinion of the Court, Order Denying Petition for Rehearing, Petition for Writ of Error, Assignment of Errors, Stipulation as to Parties, Stipulation as to Bond, Bond, Writ of Error, Citation, constitute a full and complete transcript of the record and proceedings, in the case of The People of the State of California, etc., vs. Banning Company, a corporation, et al., and also the opinion of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in San Francisco, California, this 5th day of February, A. D. 1914.

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

[Endorsed:] Filed Feb. 2, 1914. B. Grant Taylor, Clerk, by
— Erb, Deputy.

Endorsed on cover: File No. 24,061. California Supreme Court.
Term No. 368. Banning Company, Mary H. Banning, Lucy T.
Greenleaf, Mary H. Norris, Hancock Banning, and Pacific Electric
Railway Company, plaintiffs in error, vs. The People of the State
of California, upon the information of U. S. Webb, Attorney Gen-
eral. Filed February 19th, 1914. File No. 24,061.

Office Supreme Court, U. S.

FILED

DEC 28 1915

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM 1915.

No. 368. 73.

Banning Company, a corporation,
Mary H. Banning, Lucy T.
Greenleaf, Mary H. Norris, Han-
cock Banning and Pacific Elec-
tric Railway Company, a cor-
poration,

Plaintiffs in Error,

vs.

People of the State of California,
upon information of U. S. Webb,
Attorney General,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

JAS. A. GIBSON,

Attorney for Plaintiffs in Error.

EDWARD E. BACON,

Of Counsel.

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IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM 1914.

No. 368.

**Banning Company, a corporation,
Mary H. Banning, Lucy T.
Greenleaf, Mary H. Norris, Han-
cock Banning and Pacific Elec-
tric Railway Company, a cor-
poration,**

Plaintiffs in Error,

vs.

**People of the State of California,
upon information of U. S. Webb,
Attorney General,**

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

FIRST.

STATEMENT OF THE CASE.

This action was brought by the People of the State of California, on the information of the

Attorney General, defendant in error, against the Banning Company, a corporation; Mary H. Banning, Lucy T. Greenleaf, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company, the plaintiffs in error, to recover possession of and quiet the state's title to a certain tract of land known as Tide Land Location No. 57, situated along the front of the inner harbor of San Pedro in the county of Los Angeles; and to cancel and annul a patent issued to Phineas Banning for such land, dated December 16th, 1880, based upon the certificate of purchase of said tide land, issued by said state on October 10th, 1880. Said patentee is the predecessor of the plaintiffs in error. [Rec. p. 98.]

The occupancy of plaintiffs in error commenced in the year 1880, and the property has been improved by the erection and maintenance of the tracks and line of the Pacific Electric Railway Company, and other various structures thereon. The lands lie between the lines of ordinary high and ordinary low tide. [Rec. p. 103.]

The plaintiffs in error, Banning Company, Mary H. Norris, Hancock Banning and Pacific Electric Railway Company, answered, denying that the state of California is owner of the tide land in question, and denying that the whole or any part of said land at all times prior to 1870, or at any time prior to December, 1905, has been within two miles of the city or town of

Wilmington, or that at any time prior to 1870, or at any time prior to March 1st, 1888, it was within two miles of the city or town of San Pedro, and said plaintiffs set up their claim of title under the certificate of purchase and patent sought to be cancelled. They further pleaded a judgment duly and regularly made in and by the District Court of Los Angeles county, California, in an action referred to it by the surveyor general of the state of California, to determine the rights of conflicting applicants to purchase the land, wherein and whereby it was adjudged that the said Phineas Banning was entitled to the approval of the survey and application as to all of the land described in his application of January 2nd, 1878, except a certain parcel of land excluded, which is not material here. [Rec. pp. 17-19.]

It was further averred in the answer that plaintiffs (defendants in error here) by their action were seeking to deprive the defendants (plaintiffs in error here) of their said land, without compensating them therefor, and take of their property without due process of law, and to deny to them the equal protection of the law, contrary to article XIV, section 1, of the amendments of the Constitution of the United States. [Rec. p. 23.]

And they also averred that the plaintiffs (defendants in error) in depriving the defendants

(plaintiffs in error here) of their title to said lands, vested in said Phineas Banning in virtue of his purchase thereof from the state of California, would thereby impair the obligations of the contract between the said state of California and their said predecessor in interest, Phineas Banning, created by the aforesaid purchase by him from the state of California, in violation of article I, section 10, of the Constitution of the United States. [Rec. pp. 31-32.]

Plaintiffs in error proved their claim of title by proving the proceedings had and taken by Phineas Banning for the purchase of the lands in controversy in this suit, being the lands embraced in Tide Land Location No. 57, resulting in the issuance of patent for said land by the state of California to said Banning on December 16, 1881. [Rec. pp. 90-98.]

As a part of said proceedings, they introduced in evidence the affidavit and application of said Banning, dated February 15, 1866, stating, among other things, that he desired to purchase, under the provisions of the act entitled, "An act to provide for the sale of certain lands belonging to the state," approved April 27, 1863, the lands described in said affidavit and application, embracing the lands in controversy in this suit, which said affidavit and application was filed in the office of the county surveyor of Los Angeles county on February 15th, 1866,

and a copy thereof was filed in the office of the surveyor general on April 2nd, 1866, together with a duplicate of the survey, plat and field notes of the survey of said land, made by said county surveyor, pursuant to the application of said Banning. [Rec. p. 90.]

Said affidavit and application, and survey and field notes so introduced in evidence were made in conformity to and contained all the matters and things required by said act of the legislature of the state of California, approved April 27, 1863, to entitle said Phineas Banning to have said application and survey approved by the surveyor general as provided in said act; if said lands were subject to sale under the provisions of said act; and the defendants proved that said Phineas Banning duly took and subscribed the oath required by section 28 of said act of April 27, 1863, and caused the certificate of said oath to be endorsed on the description of the land sought to be purchased by said application, embracing the land in controversy in this suit, and the same to be filed on the 11th day of March, 1866, in the office of the recorder of said county of Los Angeles in conformity to the provisions of section 29 of said act of April 27, 1863, and a certified copy of said description and oath so filed in the office of the county recorder on the 11th day of March, 1866, to be filed in the office

of the state register on the 2nd day of April, 1866. [Rec. p. 90.]

They also introduced in evidence the demand made on behalf of Phineas Banning for the approval of said application of April 2, 1866, for the purchase of the lands in controversy in this suit, which demand was filed with the said surveyor general on November 16, 1877; and also introduced in evidence an amended application made by said Phineas Banning to purchase the lands in controversy in this suit, together with the affidavit of said Phineas Banning accompanying said application and the certificate and field notes of the survey of said land attached thereto and made for the purpose of said application by T. J. Ellis, county surveyor, said application, affidavit and certificate being dated December 18, 1877, and filed in the office of the county surveyor of the county of Los Angeles, on said date, and in the office of the surveyor general of the state of California on the 2nd day of January, 1878. [Rec. p. 91.]

Said affidavit and application to purchase, and said survey dated December 18, 1877, were made to correct an error in the former survey made for Phineas Banning, the field notes of which former survey were filed in the office of the county surveyor on said 15th day of February, 1866, and the same were made in conformity to and contained all the matters and things

required to entitle said Phineas Banning to have said application and survey approved by said surveyor general, under the provisions of the Political Code of the state of California, and of said Act of April 27, 1863, and of the act of the legislature of the state of California, entitled "An act to provide for the management and sale of the lands belonging to the state," approved March 28, 1868, and the acts amendatory thereof or supplemental thereto. [Rec. p. 91.]

They then introduced in evidence the certified copy of the decree rendered and entered on November 28, 1879, in the case of James McFadden v. Phineas Banning *et al.*, No. 4434, in the District Court of the seventeenth judicial district, filed in the office of the surveyor general pursuant to the provisions of the Political Code, being the same decree set forth in the amended answers of the plaintiff in error, Banning Company, and other plaintiffs in error in this cause. [Rec. p. 91.]

They then introduced in evidence the certificate of approval, in due form, of the surveyor general of the state of California, made pursuant to that decree, dated at Sacramento, February 25, 1880, of the said application of Phineas Banning to purchase the land in controversy in this suit, filed in the office of said surveyor general, April 2, 1866, and the said

amendatory application of said Phineas Banning to purchase said land in controversy in this suit, filed in the office of the said surveyor general, January 2, 1878. [Rec. p. 91.]

Plaintiffs in error proved that said Phineas Banning paid to the county treasurer of Los Angeles county, on the 5th day of March, 1880, the sum of \$121.55, being 20 per cent of the purchase price and advance interest on the balance of the purchase price of the lands embraced in said location 57, being the lands in controversy in this suit; and on the 1st day of October, 1881, paid to said county treasurer the sum of \$399.45 in full and final payment of the purchase price of said lands, together with interest thereon, as required by law. [Rec. pp. 91-92.]

They then introduced in evidence the certificate of purchase, in due form, issued by said surveyor general and register of the land office, to said Phineas Banning, for said tide land location No. 57, embracing all the lands in controversy in this suit, dated April 10, 1880. [Rec. p. 92.]

They also introduced in the evidence the certificate of said register of the land office of the state of California to the governor of the state in due form, certifying, among other things, that full payment has been made to the state for the lands embraced in tide land location No. 57,

being the lands in controversy in this suit, and that said Phineas Banning is entitled to receive a patent for the said lands. [Rec. p. 92.]

They then introduced in evidence the patent of the state of California, to Phineas Banning, in due form, and duly executed, dated December 16, 1881, purporting to grant and convey to said Banning the lands embraced in said tide land location No. 57, being the lands in controversy in this suit; which said patent recites that the legislature of the state of California has provided for the sale and conveyance of the tide lands belonging to the state by statutes enacted from time to time; and that it appears by the certificate of the register of the state land office No. 189, bearing date December 16, 1881, that the tracts of tide land therein granted have been duly and properly surveyed; that full payment has been made to the state for the same, and that Phineas Banning is entitled to receive a patent therefor, all the requirements of the act of the state legislature in relation to tide lands having been fully complied with. [Rec. p. 92.]

It was admitted on behalf of plaintiffs, defendants in error here, that said Phineas Banning possessed all of the qualifications required of purchasers of any class of state land, and that all acts and proceedings made and taken by said Banning, and by the several public officers,

in the matter of the purchase of the lands embraced in said tide land location No. 57, to and including the issuance of said patent therefor, duly complied with all the requirements of law relating, or purporting to relate, to the sale of said lands, and that said Banning made all payments required by said laws, including the payment of the fees of said offices for the filing and issuance of papers, the making of surveys, and other services performed by them in the course of said proceedings, at the respective times that such papers were filed or issued, surveys made, or services rendered; but plaintiffs (defendants in error here) do not admit that said proceedings for the purchase or patenting of said land, were authorized by any law of the state of California. [Rec. p. 92.]

Said lands throughout said proceedings are described as "State Tide Lands." [Rec. p. 92.]

The defendants, plaintiffs in error here, then offered in evidence the order made by the surveyor general of the state of California, referring to the judicial court of the Seventeenth judicial district, the contest by J. McFadden of the application of said Phineas Banning to purchase the lands in controversy in this suit, made and entered by the said surveyor general on the 20th day of February, 1878, in conformity with the provisions of 3414 of the Political Code. [Rec. pp. 92-93.] And they also offered in evi-

dence the judgment roll in the case of James McFadden v. Phineas Banning and the Southern Pacific Railroad Company, No. 4434, in the District Court of the Seventeenth judicial district: [Rec. pp. 93-98.]

The plaintiffs (defendants in error here) objected to the admission of the order of reference and judgment roll and the court sustained the objection, except as to the decree. In sustaining the objection, the court said: "I am going to sustain the objection to this; in doing so, I will reiterate that I do not think it is in any way determinative of the issues of this case, and that is why I decline to receive it." [Rec. p. 98.]

It was further admitted on behalf of plaintiffs that whatever right or title was acquired by said Phineas Banning under said patents introduced in evidence or under said proceedings for the purchase of tide land location No. 57 is now vested in the defendants in this action as set forth in their several answers. [Rec. p. 98.]

It was further stipulated that all state, county and municipal taxes which have been assessed or levied upon the lands in controversy in this suit have been paid by defendants (plaintiffs in error here) or their predecessors in interest, and that some such taxes have been so assessed, levied and paid for each year during ten years prior to the commencement of this suit. It was also

admitted on behalf of plaintiffs (defendants in error here) that plaintiffs or the state of California have not received any rents, issues or profits from any of the lands in controversy in this action. [Rec. p. 103.]

The government of the United States, in pursuance of the powers conferred by the constitution upon congress to regulate commerce with foreign nations and among the several states by the joint resolution of congress approved March 26th, 1908, authorized the secretary of war to fix established pierhead and bulkhead lines in the inner harbor of San Pedro, otherwise known as Wilmington harbor, and the secretary of war on July 29th, 1908, did establish and fix bulkhead and pierhead lines in pursuance of said resolution in said harbor and did fix and establish the lines over and across a portion of the land involved in this suit. [Rec. p. .]

The defendants (plaintiffs in error here) in this action have dedicated all that portion of the lands involved in this suit lying outside of said established pierhead lines as and for channel purposes for the uses of navigation and fisheries. [Rec. p. 33.]

The Pacific Electric Railway Company claims title to part of the land in suit under the patent to Phineas Banning; and also under the laws of California in virtue of having located and constructed its double track railway across said

property, together with terminal facilities and accommodations. Plaintiffs in error introduced in evidence a permit to the Los Angeles Inter-urban Railway Company, granted by the secretary of war of the United States, dated May 7th, 1904, approving the map of location and plans of said railway company for a railroad trestle to be built across an arm of Wilmington Bay, said location being on a portion of the lands in controversy in this suit. And it was stipulated that the said railway company had such title to right-of-way as described in said permit of the secretary of war could give by such permit and that said company leased all its rights in or on said land to the Pacific Electric Railway Company. [Rec. pp. 99-100.]

The various franchises are not questioned in this suit. [Rec. p. 104.]

The trial court adjudged that the plaintiffs in the court below, defendants in error here, were entitled to a decree, and did decree that the state of California is the owner of all of said lands described in the complaint, except a small portion thereof not material on this appeal; and that the defendants, plaintiffs in error here, had and have no right, title or interest therein. [Rec. pp. 38-40.]

The defendants appealed from said judgment to the Supreme Court of California; and assigned as grounds of error on such appeal the

failure of the trial court to sustain each and all of the defenses set up in the answer. [Rec. p. 164.]

The Supreme Court of California affirmed this judgment [Rec. pp. 166-191; 166 Cal. 630], and denied a rehearing [Rec. p. 221].

The co-defendants of the plaintiffs in error in the court below, namely, Los Angeles Harbor Company, a corporation, and Imperial Investment Company, a corporation, refused, on application, to join in the writ of error to this court, and consented that the writ of error might be pursued in the name of their co-defendants, namely, the plaintiffs in error here. [Rec. p. 222.]

The other defendant, Mace Greenleaf, husband of Lucy T. T. Greenleaf, died during the pendency of the action, and has no interest in the subject matter of the action, and it is so stipulated. [Rec. p. 223.]

This case is brought to this court on writ of error, and upon assignment of errors similar to all those urged in the Supreme Court of California, as to federal questions. [Rec. pp. 221-232.]

There were several cases other than this, involving the title to tide lands on appeal, and decided at the same time by the Supreme Court of California; and that court in one case, namely, *People v. California Fish Company*, decided

questions of law pertaining to this, and some or all of the other cases. [Rec. pp. 166-191; 166 Cal. 556 (630).]

In the part of the decision of that case applicable to this case the court held that the earliest payment made on account of the purchase price under Tide Land Location No. 57, was after the passage of the Act of 1870, amending the Act of 1868 (Sec. 72, Act of 1870), and the provision of the Constitution of 1879, Article XV, Section 3, both of which prohibited the sale of tide lands within two miles of any incorporated town or city, and as the tide land covered by Location 57 was within the prohibited limit, the attempted sale thereof was illegal and void, notwithstanding the proceedings for such sale were initiated in 1866, under the Act of 1863, which offered these lands for sale without limitation. [Rec. pp. 173, 184, 189; *People v. California Fish Company*, 166 Cal. 588, 603, 610.]

In the decision of the Supreme Court in the present case, the Supreme Court reiterated the decision thus made in the case of *People v. California Fish Company*. [Rec. p. 202.]

And in that case the California Supreme Court also decided that the proceedings in contest between applicants to purchase, and the judgment therein awarding Phineas Banning the right to purchase the land in controversy,

set up in the answer of plaintiffs in error herein, do not bind the state of California, nor estop it, from annulling its patent issued to Phineas Banning under said judgment. [Rec. p. 189; *People v. California Fish Company*, 166 Cal. 611.]

These decisions of the California Supreme Court deny that any contract arose between Phineas Banning and the state of California, or that any vested interest was acquired, by the application and proceedings made and taken by Phineas Banning to purchase the tide lands under the acts approved April 29th, 1863, and March 28, 1868, and the Political Code, which was impaired by subsequent legislation, contrary to the provisions of the federal constitution set up in the answer of plaintiffs in error, and specified as grounds of their appeal to the state Supreme Court [Rec. pp. 148-9] and in their assignments of error to this court. [Rec. pp. 224-226.]

In some of the other cases which were heard at the same time as the case at bar by the court below, and decided by it in the same series of opinions [set forth in the record at page 166 *et seq.*], it appeared that the tide lands involved therein were not situated within two miles of any city or town, and hence did not fall within the constitutional or statutory provision against sale above mentioned. In those cases, accord-

ingly, it was adjudged that the patents to such tide lands were valid; but it was further held that the title conveyed by such patents was a qualified title, subject to public easement for navigation and fisheries [Rec. p. 180]. Three of the learned justices of the court below based this decision, in part, upon a construction of the statutes under which the sale of those lands was had [Rec. pp. 174, 180, 190]. But the chief justice and the other three associate justices appear to have rested their conclusion in this regard solely upon the provisions of the Constitution of 1879 [Rec. pp. 193, 196, 200]. Hence this is the only ground for the decision as to the nature of title granted which received the approval of a majority of the court. If the same conclusion as to title had been reached in the case at bar, based upon the Constitution of 1879, it would evidently be open to review here, since the plaintiffs in error contend that their predecessor acquired a vested contract right to purchase the land here in suit prior to the taking effect of the Constitution of 1879. But the actual judgment in the case at bar is merely that the patent under which plaintiffs in error claim is void, and that they have no title of any kind to the land.

There is, therefore, in the case brought before this court by the present writ of error, no adjudication by the court below upon the char-

acter or extent of the title which was acquired by plaintiff's predecessor if his right to purchase was vested before, and therefore unaffected by, the Constitution of 1879. In this state of the record we apprehend that this court, if the plaintiffs in error prevail, will simply reverse and remand the cause to the court below, without undertaking to define the extent of plaintiffs title in advance of a decision upon that question by the state court.

The only question, therefore, which we conceive to be presented for decision by this court upon the record in the case at bar is whether Phineas Banning, predecessor in interest of the plaintiffs in error here, acquired a vested interest, or such a contract with the state of California, by his application made and proceedings taken to purchase the land in controversy as to come within the protective provisions of Article I, Section 10, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SECOND.

SPECIFICATION OF ERRORS RELIED ON.

(1) That the Supreme Court of the state of California erred in holding and deciding that no contract was created or arose prior to the taking effect of the Constitution adopted by the people

of the state in the year 1879, between the state of California and Phineas Banning, predecessor in interest of the plaintiffs in error here, by the application and proceedings made and taken by said Phineas Banning for the purchase of the lands in controversy in this suit, under and in conformity to the act of the legislature of the state of California, entitled: "An act to provide for the sale of certain lands belonging to the state," approved on the 22nd day of April, 1863, and by the judgment rendered in favor of said Phineas Banning, by the District Court of the state of California, on or about the 26th day of November, 1879, in the suit brought in said court upon reference of said District Court on the contest of said application to purchase, by the surveyor of the state of California as set forth in the answer of these plaintiffs in error as defendants in the above-entitled cause, filed in the Superior Court of California in said cause, and in evidence introduced on behalf of plaintiffs in error as such defendants, on the trial of said cause; and in holding and deciding that the obligations of the contract created by said judgment of the District Court were not by the said judgment made and entered in this cause by said Superior Court, allowed and adjudged to be impaired and abrogated by laws passed by the state of California subsequent to the creation of said contract, contrary to the

provisions of Article I, Section 10, of the Constitution of the United States; and in holding and deciding that said subsequent laws passed by the state of California, impairing and abrogating the obligations of said contract were valid and not repugnant to said provisions of the Constitution of the United States. [Rec. p. 224.]

(2) That said Supreme Court of the state of California erred in holding and deciding that no contract was created or arose prior to the taking effect of said Constitution adopted by the people of the state of California in the year 1879, between the state of California and Phineas Banning, predecessor in interest of the defendants, plaintiffs in error here, by the application and proceedings made and taken by said Phineas Banning for the purchase of said lands in controversy in this suit, under and in conformity to said act of the legislature of the state of California, approved April 27th, 1863, and said act of said legislature approved March 28th, 1868, and the acts amendatory thereof and supplemental thereto, and the Political Code of the state of California as enacted by said legislature, approved March 12th, 1872, and by said judgment of said District Court rendered on or about the 20th day of November, 1879, as set forth in the answers of these plaintiffs in error as defendants in the above-entitled cause,

filed in the Superior Court of the state of California, in said cause, and in the evidence introduced on behalf of these plaintiffs in error as such defendants, on the trial of said cause; and in holding and deciding that the obligations of the contract created by said application and proceedings to purchase and said judgment of the District Court were not by the said judgment made and entered in this cause by said Superior Court, allowed and adjudged to be impaired and abrogated by laws passed by the state of California, subsequent to the creation of said contract, contrary to the provisions of Article I, Section 10, of the Constitution of the United States; and in holding and deciding that said subsequent laws passed by the state of California, impairing and abrogating the obligations of said contract were valid and not repugnant to said provisions of the Constitution of the United States. [Rec. pp. 225-226.]

(3) That said Supreme Court of the state of California erred in holding and deciding that the state of California was not permitted to and did not in and by the necessary force and effect of said judgment of said Superior Court in this cause, deprive these plaintiffs in error of their property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. [Rec. p. 226.]

(4) That said Supreme Court of the state of California erred in holding and deciding that the state of California was not permitted to and did not in and by the necessary force and effect of said judgment of said Superior Court in this cause, deny to these plaintiffs in error the equal protection of the laws, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. [Rec. p. 226.]

THIRD.

ARGUMENT.

I.

The Proceedings for Purchase Taken by Phineas Banning in 1866, Under the Act of 1863, Created a Contract With the State of California for the Purchase of the Land in Accordance With that Act, Which Could Not be Impaired by Any Subsequent Legislative Action.

THE FACTS.

On April 27th, 1863, the legislature of the state of California passed "An Act to provide for the sale of certain lands belonging to the state." (All of the material portions of this act are set forth in the Appendix to this brief, pp. 1 *et seq.*)

Section 1 of this act provides that "the swamp and overflowed, marsh and tide lands belonging to the state shall be sold at the rate of one dollar per acre in gold or silver coin, payable twenty per cent of the principal within thirty days of the record of approval of survey or location, by the surveyor-general"; the balance with ten per cent interest to be paid one year after the passage of any act of the legislature requiring such payment. (Appendix, p. 1.)

Section 3 of the act requires intending purchasers of "any portion of the tide lands belonging to the state by virtue of its sovereignty" to file with the county surveyor an affidavit stating "that he desires to purchase said lands (describing them), under the laws of the state providing for the sale of the swamp and overflowed and tide lands of the state," and showing his qualifications to purchase, as prescribed by the act. (Appendix, p. 1.)

Section 7 of the act requires the county surveyor to enter every such application to purchase "in the regular order in which it is received"; and within thirty days to complete a survey and plat of the lands applied for, to be forwarded to the surveyor-general of the state. (Appendix, p. 2.)

Section 9 requires the surveyor-general to examine all such applications and surveys, and if found to comply with the law "and no counter-

application or conflict exists," to approve the same "at the expiration of thirty days"; and forward a copy of such approval to the county surveyor. (Appendix, p. 5.)

The record of such approval in the county surveyor's office, under section 1 of the act as above noted, imposes upon the purchaser the duty of making payment, within thirty days, of twenty per cent of the purchase price.

Section 28 of the act further requires the making and filing of an oath of allegiance; which, as required by section 29, must be endorsed upon a description of the land, and filed in the office of the county recorder of the county in which the land described is situated, "and the right of the person making the oath or affirmation shall not be deemed to attach to such land by virtue of any proceedings under this act until the moment of the filing of the description and certificate of the oath or affirmation in the office of the county recorder." (Appendix, pp. 12, 13.)

The evidence in the trial court, on behalf of the plaintiffs in error, proved that their predecessor in interest, Phineas Banning, filed with the county surveyor an affidavit and application for the purchase of the lands in controversy, on February 15th, 1866; a copy of which, together with the required survey and plat made by the county surveyor, was filed with the surveyor-

general on April 2nd, 1866. It was further proved that said Phineas Banning duly made the oath required by sections 28 and 29 above recited, and the same was filed in the county recorder's office on March 11th, 1866. [Record, p. 90.]

It was stipulated that the acts and proceedings thus taken by the applicant for purchase of the lands in suit (as well as all the further proceedings necessary to perfect his title) complied with all the requirements of the statutes in force [Record, p. 92]; and it is thus established that everything was done which the laws of California required to be done in order to invest said applicant, from whom the plaintiffs in error derive their title, with the exclusive right to purchase these lands from the state of California. Such purchase was, in fact, finally consummated, and the patent of the state issued therefor, but not until after the adoption of legislation which the court below held to operate as an effectual withdrawal of the land from sale.

The act of 1863, the significant provisions of which we have above recited, was a comprehensive and explicit offer on the part of the state of California to sell all of the tide lands "belonging to the state by virtue of her sovereignty"; and it pointed out with precision what was necessary to be done by any person desiring to

accept such offer by the state. The act even went a step further and defined the precise point of time when the rights of an applicant would attach thereunder, namely, the moment of filing with the county recorder, by the applicant, of the oath of allegiance endorsed upon a description of the land sought to be purchased. (Sections 28 and 29 of the act above recited.)

THE STATE'S OFFER TO SELL, ACCEPTED BY
FILING APPLICATION TO PURCHASE, CON-
SUMMATES A BINDING CONTRACT.

It was contended in the court below by the plaintiffs in error that by the offer of the state of California to sell, and the acceptance of that offer, in the manner required by the Act of 1863, by the proceedings taken by their predecessor in interest in the year 1866, a contract was engendered; and that no legislation of the state, subsequent to that date, can be permitted to defeat it, or prevent its enforcement, without violating the provisions of section 10 of Article I of the Federal Constitution.

The view of the law for which we thus contend was upheld in a case which arose under a very similar statute of the state of Oregon, providing for the sale of its swamp and overflowed lands, and which came to this court after decision by Judge Deady of the Circuit Court. We refer to the case of

McConaughy v. Pennoyer, 43 Fed. 196;
Pennoyer v. McConaughy, 140 U. S. 1,
35 L. Ed. 363.

The grounds on which the contention was supported were stated by Judge Deady in the decision above referred to, in a most convincing manner, and his language was quoted by this court in its opinion, as follows:

"The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal, standing offer by the state of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof with the board, and complying with the subsequent conditions of payment and reclamation. The application is a written acceptance of the offer of the state, in relation to the land described therein, and, on the filing of the same, the minds of the seller and the purchaser—the state and the applicant—came together on the proposition, and thenceforth there was an agreement between them for the sale and purchase of that parcel of land, binding on each of them, until released therefrom by some substantial default of the other, not overlooked or excused."

After quoting the foregoing language from the opinion of Judge Deady, this court proceeded to say:

"We think this view very forcible, and it would be conclusive to our minds but for the consideration which suggests itself that the bare application itself, unaccompanied by the payment of any consideration, par-

takes somewhat of the nature of a pre-emption claim under the laws of the United States, with reference to which it has been held that the occupancy and improvement of the land by the settler and the filing of the declaratory statement of such fact, confers no vested right upon him, as against the government of the United States, until all the preliminary acts prescribed by law, including the payment of the price, are complied with. *Yosemite Valley Case*, 15 Wall. 77; *Frisbie v. Whitney*, 9 Wall. 187.

"But we do not deem it necessary to determine whether the court was correct in that view of the case, for, in our opinion, another element of the case is of sufficient importance to control its disposition."

Pennoyer v. McConnaughy, 140 U. S. 1, 19.

While this court, as indicated in the passage just quoted from its opinion, discovered an adequate ground for affirming the judgment in that case, without finally committing itself to the view that acceptance of the state's offer created a contract, it was very far from rejecting that view. On the contrary, the reasoning supporting it was conceded to be conclusive, except for its possible conflict with the decisions of this court concerning the vesting of rights under the pre-emption laws.

If, then, it can be shown that there is nothing in the decisions of this court upon that subject, inconsistent with the above quoted views of

Judge Deady in the McConnaughy case, we shall be justified in claiming for those views the full approval of this court.

DECISIONS UNDER PRE-EMPTION LAWS DISTINGUISHED: THEY DO NOT INVOLVE DOCTRINE OF CONTRACT BY OFFER AND ACCEPTANCE.

The nature and development of the pre-emption laws, so far as necessary to be considered here, are clearly set forth in the opinion of this court in the case of Northern Pacific Co. v. De Lacey, from which we therefore quote the following:

"By the term 'unoffered land' is meant those public lands of the United States which have not been offered at public sale. By section 3, chapter 51, of the Act of Congress making further provision for the sale of public lands, approved April 24, 1820 (3 Stat. at L. 566), the price for which public lands should be offered for sale after the first day of July, 1820, was fixed at \$1.25 an acre, and it was provided that at every public sale the highest bidder, who should make payment as prescribed, should be the purchaser, but no land was permitted to be sold at either public or private sale for a less price than \$1.25 an acre; and it was further provided in that section that 'all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to

law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; with the exception,' etc.

"After the passage of this act the public lands came to be spoken of as 'unoffered lands,' or those which had not been exposed to public sale, and 'offered lands,' or those which had been so exposed and remained unsold, and under the statute regulating the sales of public lands it would seem that unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. *Johnson v. Towsley*, 13 Wall. 72, 88.

"By the act approved September 4, 1841, entitled 'An Act to Appropriate the Proceeds of the Sales of the Public Lands, and to Grant Pre-Emption Rights' (5 Stat. at L. 453, chap. 16), there was granted, by the tenth section thereof, to every person being the head of a family, etc., 'who since the first day of June, A. D. eighteen hundred and forty, has made or who shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding

one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions,' etc.

"By this section it will be seen that the right of pre-emption was extended equally to unoffered and offered land.

"By section 14 it was provided, however, that the selection of unoffered lands should not delay the sale of such lands beyond the time which might be appointed by the proclamation of the President, nor should the provisions of the act be available to any person who should fail to make the proof and payment, and file the affidavits required, under section 13 of the same act, before the day appointed for the commencement of the sales.

"In regard to the so-called offered lands, it was provided by section 15 of the act as follows:

"Sec. 15. *And be it further enacted,* That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the

passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser.'

"The result of the passage of this act was to grant the right to pre-empt 160 acres of either offered or unoffered land, and that as to the unoffered lands the filing of a pre-emption declaratory statement was not required, and the right of the pre-emptor to make due proof and payment remained until the time fixed by the proclamation of the President for the public sale of lands, at which time (if the proper proof and payment had not been made) the lands might be offered and sold to the highest bidder, and if not sold they would become subject to private entry by the first applicant at the minimum price. As to the offered lands, the right of the pre-emptor was dependent upon his filing a declaratory statement in the local office, as stated in section 15 of the act above quoted.

"By the fifth section of the act approved March 3, 1843 (5 Stat. at L. 619, chap. 86), it was provided that settlers under the pre-emption act of 1841, upon unoffered land, should 'make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has already been made, and within three months from the time of the settlement, when such settle-

ment shall hereafter be made, giving the designation of the tract and the time of settlement; otherwise his claim to be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice and otherwise complied with the conditions of the law.'

* * * * *

"Congress by an act approved May 20, 1862 (12 Stat. at L. 392, chap. 75), provided for the sale of public lands for homesteads, and since that time the practice of disposing of the public lands at public sale has gradually been abandoned, although the authority remained. The abandonment of these public sales resulted in giving to those who had made pre-emption filings upon unoffered land an uncertain time within which to prove or complete their proof and payment, because their time lasted until the day of the public sale proclaimed by the President. As these public sales were abandoned, the result was that these claimants were not under any obligation to make proof and payment at all.

"By the second section of the act approved July 14, 1870 (16 Stat. at L. 279, chap. 272), it was provided that 'all claimants of pre-emption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired: *Provided*, that where said date shall have elapsed before the passage of this act said pre-emptors shall have one year

after the passage hereof in which to make such proof and payment.'

"That act was amended by resolution No. 52, approved March 3, 1871 (16 Stat. at L. 601), by which twelve months in addition to that provided in the act were given to claimants to make proof and payment. Adding the twelve months given by this resolution to the eighteen months given by the act of 1870 all claimants of pre-emption rights were given thirty months to make the proper proof and payment for the lands claimed.

"These various provisions are found in the United States Revised Statutes, from section 2257 to and including section 2267, the latter section giving the thirty months as stated."

Northern Pac. R. Co. v. De Lacey, 174
U. S. 622, 628.

This account of the pre-emption laws presents, we believe, every feature necessary to an understanding of the decisions affecting the vesting of rights thereunder, with one possible exception. It will be noted that all of the provisions of law referred to in the foregoing quotation related to pre-emption claims upon surveyed lands. By the act of May 30th, 1862 (12 St. 410) it was provided, in effect, that the "privilege" of settling upon unsurveyed lands should exist in certain states and territories, including California, and that in the case of such settlements the declaratory statement must be filed

within three months after the return of the township plat to the local land office. This requirement was continued in section 2206 of the Revised Statutes.

Summarizing these various provisions of the pre-emption laws, it will be noted that at all times subsequent to the Act of 1843 acceptance of the pre-emption privilege by the settler was required to be shown by the filing of a declaratory statement within a prescribed time after settlement (or after survey, where the settlement was upon unsurveyed lands). Settlement alone, although accompanied by substantial improvements, was wholly insufficient to constitute acceptance of the pre-emption privilege, for three reasons: First, such acts are entirely equivocal—they may as well be done without, as with, intent to acquire title under the pre-emption laws; second, to permit mere settlement and improvement of public lands to deprive Congress of all power of subsequent disposition thereof, would be manifestly intolerable—which leads directly to the third reason, namely, that the right of the pre-emptor, by its origin and nature, is only a conditional right, to be preferred (as against members of the public generally who have no better claim or right to the land) in the purchase of lands, *if and when* they are offered for sale.

Each of these reasons for denying significance and effect to mere settlement and improvement under the pre-emption laws has been repeatedly affirmed in the decisions of this court. A single example of each will suffice. For the first, we may quote the following from the decision of this court in *Tarpey v. Madsen*·

“It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go on to the public domain, build cabins, and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and inclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not, in the eye of the law, considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. * * *

“But notwithstanding this recognition of the rights of individual occupants as against all other individuals, it has been uniformly held that no rights are thus acquired as against the United States.”

Tarpey v. Madsen, 178 U. S. 215, 221.

The second reason—the insuperable objection to permitting mere settlement on the public lands to prevent their subsequent disposition by Congress—was emphatically stated by this court,

speaking through Mr. Justice Field, in "The Yosemite Valley Case" (cited in *Pennoyer v. McConnaughey*, *supra*.) There, answering the contention that settlement upon unsurveyed lands, with intent to found a pre-emption claim, gave a vested right, the court said:

"If such be the effect of mere settlement, with a view to pre-emption, upon the power of Congress to grant the lands occupied to another party, it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses, of the United States, though needed for arsenals, fortifications, lighthouses, hospitals, custom houses, court houses, or for any other of the numerous public purposes for which property is used by the government. It would require very clear language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control by mere settlement of a party, with a declared intention to purchase, could be attributed to its legislation."

The Yosemite Valley Case, 15 Wail. 77,
86, 21 L. Ed. 82.

The third reason for the rule as to vested rights under the pre-emption laws is also clearly stated in the same decision of this court, as follows:

"Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption *in case the lands are offered for sale in the usual manner*; that

is, the privilege to purchase them *in that event* in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands *before they are offered for sale*, or to appropriate them to any public use."

The Yosemite Valley Case, 15 Wall. 77.
87, 21 L. Ed. 82.

The decision from which we have last quoted is one of the cases cited by this court in *Pennoy v. McConnaughy*, *supra*, as supporting the rule that no vested right accrues under the pre-emption laws prior to payment of the purchase price (140 U. S., p. 20). Some of the expressions used in "The Yosemite Valley Case" appear to sanction this statement of the rule. Indeed, the first sentence of the passage which we have last quoted from that decision contains a qualifying phrase to that very effect. That qualification, however, has no bearing on the argument of the passage quoted, as to the real purpose and effect of the pre-emption laws. And

when the facts of that case are considered, it will be at once obvious that the only question involved in that case was the effect of mere settlement and improvement without the filing of any declaratory statement under the pre-emption laws.

Briefly stated, the facts in "The Yosemite Valley Case" were that one Hutchings, who there claimed a pre-emption right, had never filed any declaratory statement under the pre-emption laws. His settlement was made prior to any survey of the land; and, six weeks after that settlement, the lands being still unsurveyed, Congress granted the whole of the Yosemite Valley, in which the land claimed was situated, to the state of California for a public park. The question of the rights of a pre-emptioner who has settled upon lands open to pre-emption and sale, and has made formal entry by filing his declaratory statement, therefore could not and did not arise in that case. On the contrary, the question which was involved and decided was that stated in the excerpts we have made from the opinion in the case, namely: Whether mere settlement upon the public domain, although with the intent of subsequently acquiring the title under the pre-emption laws, can be allowed to interfere with the power of Congress to withhold land from sale and make other disposition of it—a question to which

there could be but one answer, as conclusively shown in the reasoning which we have quoted from the decision therein.

The other decision cited in *Pennoyer v. McConnaughy*, *supra*, as dealing with the rights of pre-emptioners (*Frisbie v. Whitney*, 9 Wall. 187), it is equally clear, presented no question of rights under a duly filed pre-emption statement. In that case, which also arose in California, the land in question had been reserved from sale pending determination of the validity of a Spanish grant. The final decision of this court being adverse to the grant, the land was thereby released from the reservation. But the public surveys had never been extended over the land, and it was, moreover, in the actual occupation of *bona fide* claimants under the Spanish grant. Notwithstanding such occupation, attempts were made to initiate pre-emption claims by forcible intrusion upon the lands, followed by an offer to file declaratory statements. But the local land officers rightfully refused to receive such statements, when first tendered, because the land was then unsurveyed. Subsequently, under a special Act of Congress for the relief of claimants under the Spanish grant, provision was made for the surveys of the land and its sale to *bona fide* claimants in actual possession under that grant who should make application therefor within twelve months after the

return of the survey. After the passage of that act, and the survey of the lands thereunder, pre-emption entry was again tendered, and again rightfully refused because, by the very force of that act, the land had been in effect withdrawn from pre-emption entry, pending settlement of claims of *bona fide* occupants under the Spanish grant.

In the course of its opinion in the case, this court noted the difficulty of sustaining a pre-emption entry initiated by forcible intrusion upon the peaceable possession of another, but, "resolving this difficulty in favor of" the pre-emption claimant, held that he had acquired no vested interest, and in that connection observed: "So far as anything done by him is to be considered, his claim rests solely upon his going upon the land and building and residing upon it." Again, after stating the contention that complainant had done all that was in his power "towards perfecting his claim and he should not be held responsible for what could not be done," the opinion of this court proceeds:

"To this we reply, as we did in the case of *Rector v. Ashly* (6 Wall. 142), that the rights of a claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts show that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their

provisions, whether they be hard or lenient."

Frisbie v. Whitney, 9 Wall. 187, 193, 197,
19 L. Ed. 668.

The consideration suggested in the passage last quoted is one which evidently strikes at the root of the whole matter. Congress, by making general provision in its acts for the acquisition of title to public lands, by the method indicated in the pre-emption laws, did not in any way bind itself to allow any particular tract of land to be acquired by that method. Anyone who settled upon public land which had not been surveyed, and on which, therefore, he could not file his declaratory statement, necessarily ran the risk that the land would never be subjected by Congress to such filing—the risk, in other words, that Congress would make some other specific disposition of the land before offering it to general sale or entry. This is a cardinal point of distinction between the pre-emption and similar laws for the acquisition of title to public land of the United States, and laws passed by the individual states such as the statute of California here in question, providing for the sale of their lands. The federal pre-emption laws have provided a scheme or method for the acquisition of the public lands of the United States before it was ascertained, or ascertainable, that specific lands would be ultimately subject to ac-

quisition by that mode. On the other hand, state laws like that now before the court have designated the lands to which the prescribed mode of acquisition was applicable: in a word, they have made a *present* offer of defined lands for sale, so that a *present* acceptance of that offer could be made as to any part of the designated lands, and thereby a contract between the state and the applicant to purchase be created.

It may be suggested in answer to our last contention that whenever any particular public lands of the United States have become open to entry and sale by reason of completion of the survey thereof, the pre-emption law, being then in force, would constitute a present offer of such lands for acquisition under that law, not distinguishable in principle from the offer made by such a statute as the California Act of 1863. This may be conceded, but the fact remains that none of the decisions of this court adverse to the vesting of rights under the pre-emption laws have dealt with a case in which there was shown the acceptance of such a present offer, under the pre-emption laws, by settlement and the filing of a declaratory statement upon lands then open to entry. (We do not, of course, here take into account cases where the right acquired by such settlement and filing has been abandoned or forfeited by subsequent failure of the claimant to perfect his title by taking the several steps

required by the pre-emption law,—cases which are not at all in point here.)

While the two cases we have above analyzed, "The Yosemite Valley Case" and *Frisbie v. Whitney*, are the only decisions cited by this court in the *Pennoyer* case as supporting the rule there stated concerning the vesting of rights under the pre-emption laws, we are frank to admit that there are a number of other cases in which the rule has been stated in similar terms: that is, as requiring payment of the purchase price before initiation of a vested right under those laws. We have, we believe, examined all of the decisions of this court which might be claimed to be of that impression, and, without attempting here to analyze those cases individually (which it seems to us would be more of a burden than an aid to the court), we feel justified in stating positively, as we have done above, that none of these cases squarely presented the question of the rights of one who has accepted the offer contained in the pre-emption laws by actual settlement and filing of his declaratory statement upon lands which were at the time open to sale.

Therefore, as we asserted at the outset of this discussion, the doctrine that the acceptance of a statutory offer of sale by filing an application to purchase in the prescribed mode is all that is required to engender a contract between the ap-

plicant and the state, should be regarded as having the unqualified approval of this court, since the only qualification reserved by the opinion in *Pennoyer v. McConnaughy*, *supra*, namely, the possibility of conflict between that doctrine and the decisions of this court under the pre-emption laws, is shown to have no substantial basis.

SUFFICIENT CONSIDERATION FOR STATE'S CONTRACT FOUND IN EXPENDITURES ON FAITH OF OFFER AND IMPLIED PROMISE BY APPLICANT TO PAY PURCHASE PRICE.

It may, however, be claimed that in the observations of this court in *Pennoyer v. McConnaughy*, *supra*, as well as in some of the other decisions there alluded to, arising under the pre-emption laws, the question is suggested whether, without payment of some part of the purchase price, any consideration would be shown for such a contract on the part of the state as we contend was here created. How this question might be decided in a case arising under the pre-emption laws, where a declaratory statement had been filed but no payment had been made, there is no occasion here to determine; nor, as we have already indicated, has the question been determined in any of the decisions of this court under the pre-emption laws.

As applied to such a statute as the act of California here in question, there are two clear and sufficient answers to the suggestion of lack of consideration. The first is found in the settled principle, as old as the law of contracts, that

"Damage to the promisee constitutes as good a consideration as benefit to the promisor. In Pillan v. Van Mierop, 3 Burr. 1663, the court say, 'Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another is a sufficient consideration for such a promise, and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

Hendrick v. Lindsay *et al.*, 93 U. S. 143, 148-9, 23 L. Ed. 855.

In the case at bar it was stipulated in the trial court, not only that the proceedings for the purchase of these lands taken by Phineas Banning, under whom plaintiffs in error claim, were in due compliance with the laws providing for the sale of those lands, but also that "said Banning made all payments required by said laws, including the payment of the fees of said officers for the filing and issuance of papers, the making of surveys and other services performed by them in the course of said proceedings, at the respective times that such papers

were filed or issued, *surveys made*, or services rendered." [Record, p. 92.]

The plaintiffs in error also offered at the trial to prove by a competent witness that the fees for the survey made upon the application of said Banning in 1866 amounted to at least \$241.00. This evidence was objected to by counsel for the defendants in error, and the trial court thereupon ruled as follows:

"The presumption, it seems to me, would be that he paid whatever the legal fees were, whether they were large or small; whatever was reasonable was paid. Now this witness might state \$241, and another witness might state \$75, and it would not make any difference to the court whether it was \$241 or \$75 or any other amount. The objection will be sustained." [Record, p. 110.]

This ruling of the trial judge would doubtless be justified if the view of the law subsequently announced by the Supreme Court of the state in its decision in this case were sound, namely, that no contract or vested right can be acquired by a purchaser of public lands prior to payment of the *purchase price* or some part thereof. On the other hand, if we are correct in our present contention, that legal consideration may equally well consist in expenditures made by the applicant to purchase, in reliance upon the offer of the state, and as a necessary consequence of his acceptance of that offer in

the mode prescribed by the law of the state, then, we submit, plaintiffs in error should have been permitted to prove the actual expenditures made by the applicant in the proceedings under which they claim.

We may concede, however, that the learned judge of the trial court was right in ruling that the precise amount paid, whether \$241 or some smaller amount, was immaterial; and that evidence having been given of an actual survey made for the purposes of this application (which the record shows embraced upwards of four hundred acres) it necessarily followed that a substantial expense was incurred by the applicant for that purpose—an expense which in this case, according to the offered evidence, amounted to more than one-half of the purchase price itself. [Record, p. 92.]

In any event, it is manifest that the question of law presented on the record for the decision of this court is the same as though the offered proof had been received instead of being rejected; the question, namely, whether a substantial expense incurred on the faith of the state's offer to sell, and being a necessary incident of accepting that offer, does not constitute sufficient consideration for the contract of the state to complete the sale in accordance with its accepted offer.

It may be worth while to point out that noth-

ing analogous to such expenditures is required of a pre-emptioner under the federal law, prior to payment of the purchase price. The expense, if any, involved in settlement and improvement, is not analogous, for the reason that such settlement and improvement have always, and rightly, been regarded as a privilege and benefit conferred upon the settler, not as a detriment suffered by him. Furthermore, as we have already pointed out, the decisions of this court adverse to vested rights of pre-emptioners have all dealt with cases in which the offer made by the pre-emption law, as applied to the particular land in question, must be regarded as a conditional offer,—to permit the pre-emption of the land only in the event that it should ultimately be subject to general sale or entry.

Again, as we have urged, there is yet another answer to the suggestion of want of consideration. It is, that the filing of a formal application, as required by the statute, to purchase the designated lands, "under the laws of the state providing for the sale" thereof, should be held to imply a promise on the part of the applicant to pay the purchase price prescribed by those laws. This is the view advanced by Judge Deady in the passage from his opinion quoted by this court, as already noted, in *Penny v. McConnaughy* (140 U. S., p. 19).

relying upon the remedy of forfeiture rather than compelling performance had become a fixed policy.

It may possibly be claimed that our present contention runs counter to the decision of this court in *Campbell v. Wade*, which arose under a statute of the state of Texas providing for the sale of certain of its public lands. But it will be seen, upon due examination, that that statute (the provisions of which are fully stated in the case of *Telfener v. Russ*, 145 U. S. 542) differed in essential particulars from our California statute. In the first place, under the Texas statute, the initial step was an application—not to purchase the lands, but to have a survey made, which the public surveyor, receiving such application, was required to make within three months and file a plat thereof in the general land office within a further period of sixty days. This application for a survey, as this court properly and necessarily held, did not bind the applicant to purchase the land. It would be difficult indeed to discover any plausible ground on which the contrary could be asserted. Furthermore, as this court explicitly declared in its opinion:

“By the express terms of the act, it was only *after* the return and filing in the General Land Office of the surveyor’s certificate, map and field notes of the survey, that the applicant acquired the right to pur-

This proposition, we submit, is so obvious that if the transaction were one between two private individuals no one would think of questioning it. The effect of the transaction cannot be different when one of the parties happens to be a sovereign state. For the decisions of this court leave no room to doubt that

“When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself and is bound accordingly. *Davis v. Gray*, 16 Wall. 203.”

Hall v. Wisconsin, 103 U. S. 5, 11, 26 L. Ed. 302.

We are not aware of any case in which the state has attempted to enforce by suit this implied obligation of an applicant for purchase to pay the stipulated price. It has always preferred to treat the applicant's rights as forfeited by failure to pay, and thereupon sell the land to some other purchaser willing to pay for it. But this policy and practice of the state, voluntarily adopted, could not estop it from pursuing the contrary course in any case, and insisting upon performance of the purchaser's obligation to pay the agreed price. Certainly, at least, no such estoppel could be claimed in the present instance where the transaction was had under one of the earlier laws providing for the sale of the state's public lands, and before the practice of

chase the land by paying the purchase money within sixty days thereafter. But for this declaration of the act, we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the state. Clearly, there was no such right in advance of the survey."

Campbell v. Wade, 132 U. S. 34, 37, 33
L. Ed. 340.

The "express terms" of the Texas statute here referred to have no counterpart in our California Act of 1863 unless it be in the explicit provision, to which we have drawn attention (see sections 28 and 29 of the Act of 1863, Appendix, p. 13), by which the purchaser's right is made to attach upon the filing with the county recorder of a description of the property sought to be purchased, with the applicant's oath of allegiance endorsed thereon. In the case at bar this required filing was made long before any attempted change in the law providing for sale.

It may also be noted, as a further point of distinction between this Texas case and our own, that in *Campbell v. Wade* it appeared not only that the survey had not been made, but that the time allotted by the terms of the act to the county surveyor for making the same, after application therefor, had not elapsed when the land was withdrawn from sale by a subsequent act of the legislature. Furthermore, the decision in

the later case arising under the same statute, which we have mentioned above (145 U. S. 522), evidently recognizes that under this Texas statute, as construed by the courts of that state, a vested right to purchase did accrue upon the filing of the required return of survey and prior to the payment of any part of the purchase price.

Telfener v. Russ, 145 U. S. 522, at p. 532, 36 L. Ed. 800.

Lastly, it is significant that no allusion was made to the decision in *Campbell v. Wade* (rendered at October term, 1889) by this court in discussing the question of vested contract right in *Pennoyer v. McConnaughy*, *supra*, which was decided at the next term, and the opinion in which was delivered for the court by Mr. Justice Lamar, who had concurred in the decision in *Campbell v. Wade*; Mr. Justice Field, who delivered the opinion in *Campbell v. Wade*, as well as all but one of the other justices who concurred therein, being still members of the court when the decision in *Pennoyer v. McConnaughy* was delivered. The inference can scarcely be avoided, we submit, that the decision in *Campbell v. Wade* was not regarded as pertinent to the question of vested right as it arose under the Oregon statute involved in *Pennoyer v. McConnaughy*. And neither of these decisions, we

submit, can be regarded as any real authority for the proposition that payment of the purchase price is the only legal consideration possible for a contract of the state, under such a statute as that of Oregon involved in *Pennoyer v. McConnaughy*, *supra*, or that of California now before the court.

It follows, we submit, for each of the several reasons above adduced, that a sufficient consideration, as well as every other essential element of a contract, was presented in this transaction, by which the predecessor of plaintiffs in error accepted the offer of the state, and thereby bound himself to purchase, and the state to sell, the lands described in his application.

PRIOR DECISIONS OF COURT BELOW NOT BIND-
ING ON THIS COURT, NOR PERSUASIVE AS
AUTHORITY.

In the opinion of the court below some prior decisions of that court are cited to the point that no contract arises on the sale of public lands until payment is made on account of the purchase price. It will be observed, however, that all of these decisions were rendered subsequent to the year 1866, and therefore after the passage of the act and the taking of the proceedings on which plaintiffs in error found their title. These decisions are, therefore, in no way binding upon this court, which is not only at liberty, but un-

der the duty, as it has repeatedly declared in such cases as that at bar, to examine and determine for itself the question of the existence and the impairment of the asserted contract, although it may require the construction of a state statute contrary to the decision of its courts. Precisely this result was reached in a recent case coming up from the same state, viz.,

Russell v. Sebastian, 233 U. S. 195.

This doctrine is too firmly established to require further citation, and we will only add a reference to two cases, decided at the last term, in which it was reiterated:

Louisiana R. & N. Co. v. Behrman, 235 U. S. 164;

New York Elec. L. Co. v. Empire City Co., 235 U. S. 179.

It is pertinent, we believe, to observe in the present case that the question is not one of statutory construction, at least in the ordinary sense of that term. It is not the meaning of the statute itself that is at issue, but rather the effect which under settled principles of general law ought to be given to acts done in accordance with the statute's express and unequivocal requirements. On this question the prior decisions of the court below, which it purported to follow in the case at bar, are deprived of any persuasive force by the consideration that in

none of them does it appear that the attention of the court was directed to either of the propositions which we have here advanced as establishing sufficient consideration for a contract on the part of the state, independent of payment of the purchase price.

If the evidence in any of the prior California cases cited by the court below showed that substantial expenditures had actually been incurred by an applicant to purchase,—on the faith of the state's offer to sell, and as a necessary consequence of accepting that offer in the mode prescribed by the statute—the fact was not alluded to by the court in rendering any of those decisions. And it may therefore be safely assumed that the point was not urged by counsel that such expenditures constituted a consideration supporting the state's obligation to sell. Only two of the cases, in fact, arose under the provisions of laws for the sale of tide lands, requiring a survey as an initial step in the proceedings to purchase.

The other element of consideration which we have urged—the implied, and enforceable, obligation on the part of an applicant to purchase to pay the price in the amount and at the time prescribed by the statute—is likewise ignored, and, it must be concluded, wholly overlooked in all of the cases relied on by the court below. The existence of such an obligation has not been

denied, of course, in any of the cases now under discussion; nor, as we have stated, in any other decision which we have been able to discover. Neither, we again submit, can any valid reason be advanced why the existence of such an obligation should be denied. On the contrary, that obligation is the just and natural consequence of the act of the purchaser in making formal application to purchase on the terms previously offered by the state; and therefore is one which the law must impose in every such case.

The inevitable conclusion is, we submit, that adequate authority for holding payment of the purchase price an indispensable prerequisite to a binding contract for the sale of public lands is no more to be found in the prior adjudications of the state court than in the decisions of this court interpreting the pre-emption and other public land laws of the federal government.

OUR CONTENTION OF CONTRACT BY OFFER AND
ACCEPTANCE SUSTAINED BY NUMEROUS DE-
CISIONS UNDER CONTRACT CLAUSE OF FED-
ERAL CONSTITUTION.

The rule for which we contend, that acceptance of the state's offer to sell, in the mode invited by the state in making that offer, creates a contract binding on both parties, is sustained by the most elementary principles of the law of contract. Without imposing on the court by

citing the numerous cases in which the principle has been applied to questions of contract generally, we may call attention to decisions in which the principle has been invoked in determining the existence of a contract entitled to constitutional protection against impairment by legislation; for

“Since the decision in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, this court has had frequent occasion to apply and enforce the doctrine that *a grant of rights in public property accepted by the beneficiary* will amount to a contract entitled to protection against impairment by action of the state, or municipality acting under state authority.”

Blair v. Chicago, 201 U. S. 400, 472.

A recent case in this line of decision, *Russell v. Sebastian* (which we have already cited on another point), is particularly significant here because it involved, like the case at bar, an offer made by the state, not to a particular individual or corporation, but to any person or corporation which might choose to accept it. This offer was a provision of the Constitution of California extending, without limitation of time, to any person or corporation organized for the purpose, the right to use the streets of any city in the state (having no municipal works of its own) for the purpose of furnishing water or light to the inhabitants. This court, reversing

the decision of the court below, held that a gas company which had established its works in a city prior to the repeal of this constitutional provision thereby obtained a perpetual franchise to continue service throughout the whole territory of such city, and the applicable principle was thus stated:

"That the grant, *resulting from an acceptance of the state's offer*, constituted a contract and vested in the accepting individual or corporation a property right, protected by the federal Constitution, is not open to dispute in view of the repeated decisions of this court."

Russell v. Sebastian, 233 U. S. 195, 204.

Supporting this declaration of law, the court there cited the following cases in which the same principle was approved and applied:

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 660, 29 L. Ed. 516, 520, 6 Sup. Ct. Rep. 252;

New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 680, 681, 29 L. Ed. 525, 527, 528, 6 Sup. Ct. Rep. 273;

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 9, 43 L. Ed. 341, 345, 19 Sup. Ct. Rep. 77;

Louisville v. Cumberland Teleph. & Teleg. Co., 224 U. S. 649, 663, 664, 56 L. Ed. 934, 940, 941, 32 Sup. Ct. Rep. 572;

Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 552, 57 L. Ed. 633, 639, 44 L. R. A. (N. S.) 405, 33 Supt. Ct. Rep. 303;
Owensboro v. Cumberland Teleph. & Teleg. Co., 230 U. S. 58, 65, 57 L. Ed. 1389, 1393, 33 Supt. Ct. Rep. 988;
Boise Artesian Hot & Cold Water Co. v. Boise City, 230 U. S. 84, 90, 91, 57 L. Ed. 1400, 1406, 1407, 33 Sup Ct. Rep. 997.

The foregoing list of pertinent authorities could be readily extended, but we shall only add the case of New York Electric Lines Co. v. Empire City Subway Co., *supra*, decided at the last term of this court, in which Russell v. Sebastian, *supra*, was approvingly cited, and it was shown to be established by the decisions of this court, in cases of like impression, that the creation of a contract in such a case is not postponed until actual performance of the express or implied conditions of the grant, by the grantee's entering upon the public service contemplated; but that, on the contrary, such grants

"are made and received with the understanding that the recipient is protected by contractual right *from the moment the grant is accepted* and during the course of performance as contemplated, as well as after that performance."

Justifying this view, the opinion in that case also declares:

“Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate.”

New York Elec. L. Co. v. Empire City Co., 235 U. S. 179.

So in the case at bar, as we have shown, a consideration adequate to support the contract of the state subsists in the implied obligation of the applicant to complete his purchase and pay the stipulated price. Moreover, as we have also shown, there is here an additional and independently sufficient consideration in the expense incurred by the applicant to purchase, as a necessary consequence of accepting the state's offer in the prescribed mode.

We therefore most respectfully submit that, consistently with the fundamental principles of the law of contract, and with the application of those principles by this court in innumerable decisions, it cannot be denied that the predecessor of plaintiffs in error acquired by his application to purchase, and the substantial expenditures which he necessarily incurred in making that application according to the requirements of the Act of April 27, 1863, a contractual right to purchase the land in suit, on the terms pre-

scribed by that act, which no subsequent legislation of the state could take away.

II.

The Judgment Rendered by the District Court in the Contest Proceedings in 1879 Conclusively Established the Contract Right of Phineas Banning to Purchase the Land in Suit and that Right Constituted Property of Which he Could Not be Deprived by Subsequent Legislation Without Violating Both the Contract Clause and the Due Process Clause of the Federal Constitution.

It will be obvious to the court that the proposition we now urge, as briefly set forth in the above caption, presents a ground upon which the judgment of the court below must be reversed wholly independent of the contention, previously presented, that a binding contract was engendered by the proceedings taken under the Act of 1863, and before the provisions therein made for the sale of tide lands were affected by any subsequent legislation.

It will also be perceived that it is immaterial to our present contention whether any of the legislation subsequent to the Act of 1863 was intended, or should be construed, to defeat the effect of a proceeding commenced under that act by withdrawing from sale land which had been applied for thereunder. This for the reason that the judgment here relied upon, by the

plaintiffs in error, as a conclusive adjudication of the right of their predecessor to purchase this land, is equally effectual to that end whether it was based upon a correct, or an erroneous, construction of the law on which that right depended. If that judgment was based upon an erroneous construction of the applicable statutes, this was but an error of law which might have been corrected by appeal, but which takes nothing from the force of the judgment, allowed to become final, as *res adjudicata*.

“A judgment is conclusive as to all the *media concludendi*, and it needs no authority to show that it cannot be impeached either in or out of the state, by showing that it was based upon a mistake of law.”

American Express Co. v. Mullins, 212
U. S. 311, 314.

Although the point is thus unnecessary to be determined, we shall ask the court's indulgence while we briefly indicate the reasons why the legislation subsequent to the Act of 1863 should not be construed as defeating proceedings commenced under that act. This matter is open for the consideration of this court, we submit, regardless of what the court below may have held with respect to the construction of that legislation, because it enters into the question whether a contract had been created and was in existence at the time the prohibition of sales by the Con-

stitution of 1879 became operative, since that constitutional prohibition was clearly applied and made effective by the court below against the contract and vested right claimed by plaintiffs in error.

New York Electric Lines Company v.
Empire City Company, *supra*, 235 U.
S. 179, and cases cited.

NONE OF THE LEGISLATION INTERMEDIATE THE
ACT OF 1863 AND THE CONSTITUTION OF
1879 SHOULD BE CONSTRUED TO AFFECT
THE RIGHTS OF AN APPLICANT UNDER THE
FORMER ACT TO COMPLETE HIS PROCEED-
INGS FOR PURCHASE IN ACCORDANCE
THEREWITH.

The first legislation subsequent to the Act of 1863 and dealing with the same subject-matter was the Act of March 28th, 1868 (Appendix, pp. 15 *et seq.*). The latter act was in the nature of a codification of several prior statutes relating to lands of the state, including the Act of 1863, and its provisions for the sale of tide lands were substantially identical with the last mentioned act. These prior acts, including that of 1863, were expressly repealed by the Act of 1868, but with a proviso or saving clause (section 71) couched in the following terms:

“Provided, however, that the provisions of this act shall not in any manner affect

any legal or equitable claims now existing on any of the lands hereinbefore described, in favor of any claimant under the state, nor affect any suit or proceeding which is now pending respecting the same, arising out of any claim now made; but the courts of the state may proceed and adjudicate upon said rights, and patents or other evidences of title may issue for the same to the parties entitled thereto, under any existing laws of this state, the provisions of this Act to the contrary notwithstanding."

On April 4th, 1870, the legislature of California passed an act amending section 70 of the Act of 1868 by incorporating therein the following provision:

"All swamp and overflowed, salt marsh and tide lands * * * within two miles of any town or village are hereby excluded from the provisions of this act."

Unless this amendment is to be given a retrospective and retroactive effect, it cannot be held to apply to proceedings initiated under the Act of 1863 and expressly saved and continued in force by the provisions of section 71 of the Act of 1868, which we have quoted above. Such a conclusion is forbidden by the settled rules of statutory construction.

"The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction

unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

United States F. & G. Co. v. United States, 209 U. S. 306, 314.

Moreover, by the express terms of this amendment to section 70 of the Act of 1868, its only effect is to exclude the designated lands "from the provisions of *this act*"; i. e., the Act of 1868, not the Act of 1863, proceedings taken under which had been already continued in force by section 71 of the Act of 1868.

In 1872 all general laws of the state of California were re-enacted in four codes, the provisions relating to the sale of public lands being made a part of the Political Code. In substance, these code provisions for the sale of tide lands were the same as those contained in the Acts of 1863 and 1868, except that section 3488 of the Political Code contained the following provision:

"All swamp and overflowed, salt marsh, and tide lands within * * * two miles of any incorporated city or town are excluded from the operation of this chapter."

Here, again, the exact phraseology must be carefully noted. The effect of this provision is simply to exclude the lands described "from the

operation of *this chapter*." In terms, therefore, it applies only to applications made under the code, and does not apply to applications made under previous acts. Nor as to these is the code to be construed retrospectively. Under section 3 of the Political Code, "No part of it is retroactive, unless *expressly* so declared."

Section 18 of the Political Code, by which the repeal of the Act of 1868, and numerous other statutes, was effected, provides as follows:

"No statute, law, or rule is continued in force because it is consistent with the provisions of this code on the same subject, but in all cases provided for by this code all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it affect any private statute not expressly repealed."

It will be perceived that by the express terms of the Political Code, as well as of the Act of 1868, careful provision was made for preserving unaffected proceedings commenced under the pre-existing statutes; and, we submit, the only reasonable and fair construction to be given to these provisions, and one required by the settled

rules of interpretation, is that land for which application had been duly made under the Act of 1863 was not withdrawn from sale, but, on the contrary, continued to be subject to purchase by the consummation, in regular course, of a proceeding so commenced.

However, as we have already pointed out, the determination of this question either way cannot affect our prior contention, that a binding contract of sale was created by the acceptance of the state's offer, through the filing in 1866 of application to purchase under the Act of 1863; nor would the construction of the amending statute of 1870, or the Political Code adopted in 1872, adverse to our contention here, affect the conclusiveness of the judgment, to which we now ask the attention of the court.

JURISDICTION OF THE DISTRICT COURT AND
CONCLUSIVENESS OF THE JUDGMENT IN
CONTEST PROCEEDINGS.

The statutory provisions which governed the matter of contests arising in the Land Office and the effect of judgments therein, at the time the contest here involved was instituted, are found in sections 3414, 3415 and 3416 of the Political Code. (Substantially the same procedure, however, was provided for by section 27 of the Act of 1863. Appendix, pp. 11, 12.) By these, provision is made for referring all con-

tests arising in the surveyor-general's office to the courts, "when in the judgment of the officer *a question of law is involved*, or when either party demands a trial in the courts of the state"; and it is further provided: That, upon the filing of the complaint in the action on contest, the court shall have "*full and complete jurisdiction to hear and determine the action*"; and that, upon a filing of the copy of judgment with the register that officer must "issue the certificate of purchase or other evidence of title in accordance with such judgment." (Appendix, p. 32.)

There is thus conferred upon the court not merely the "*quasi-judicial* functions (of the surveyor-general) in determining mere matters of fact," but "full and complete jurisdiction to hear and determine the action"; or, in other words, the jurisdiction appropriate to courts of general jurisdiction.

The jurisdiction thus conferred upon the District Court was described by the Supreme Court of California in *Hinckley v. Fowler*, a case arising under the cognate provisions of the Act of 1863, and decided before the institution of the contest proceeding involved in the case at bar. We quote its very pertinent language:

"Under the twenty-seventh section of the act, when a contest is referred to the courts for settlement, it is to be determined upon

the principles of law and equity involved. The court is to exercise its judicial authority in adjudicating the entire case as presented. It is not confined to the narrower measure of relief which the surveyor-general, in the exercise of mere quasi-judicial functions, in determining mere matters of fact, might award. Such was not the intent of the statute. *Its purpose was to provide for the settlement of the rights of the parties litigant, at once and forever. The jurisdiction of the court is as broad and effective as though one of the parties had already obtained a title to which the other had the better right.* The surveyor-general is to determine only those contests in which the survey, 'or purely a question of fact,' is involved. But when a question of law only is involved, or one of law and fact, the parties are to be referred to the courts for its determination, and in the courts the ordinary rules of pleading and of evidence are to be observed, and judgment is to be rendered as in ordinary adversary proceedings."

Hinckley v. Fowler, 43 Cal. 56, 64.

In the cases thus provided for, it has been uniformly held that the action is not an ordinary action between the nominal plaintiff and defendant, but that each party to the contest is an actor, and must set up in full all the facts showing *his right to purchase from the state*. It is obvious, therefore, that in all cases where the court has acquired jurisdiction of the action, its jurisdiction must extend to the de-

termination of the right of the applicant, or the successful applicant, *to purchase from the state.*

Cadierque v. Duran, 49 Cal. 356;

Christman v. Brainerd, 51 Cal. 534;

Wright v. Laugenour, 55 Cal. 280;

Dillon v. Saloude, 68 Cal. 267;

Cushing v. Wilson, 68 Cal. 473;

Garfield v. Wilson, 74 Cal. 175;

Anthony v. Jilson, 83 Cal. 299-300;

Goldberg v. Thompson, 96 Cal. 117.

In the case last cited, where the Supreme Court of California reviewed a judgment rendered in such a contest action, the scope of the issues necessarily involved in any such case was stated thus:

“Appellant contends that the findings of the Superior Court as to fitness for cultivation and want of settlement, being outside the issues made by the pleaders, must be disregarded. But the rule invoked has no application to this class of cases, in which each party is an actor, and must allege and prove a complete case in order to prevail. If the land is of the class which can be sold only to residents, and neither contestant is a settler, the court cannot ignore the character of the land and the question of residence because it is convenient to the parties to do so. On the contrary, it must decide against both if neither is entitled to purchase.”

Goldberg v. Thompson, 96 Cal. 117, 118.

Other cases cited maintain the same doctrine. If any other view were adopted the expressions used in these statutes would be merely nonsensical; and, it may be added, the function of the courts purely farcical. A general jurisdiction is conferred upon the court "to determine the action"; and it cannot determine the general issue of priority of right, without, at the same time, and necessarily, determining the right of the prevailing party against the state.

Accordingly, where only one of the contestants is an applicant for purchase, it is held in numerous cases to be the duty of the court to determine as to his right to purchase; and the same principle will apply, in other cases, to the prevailing applicant.

Tyler v. Houghton, 25 Cal. 26-30;
Cadierque v. Duran, 49 Cal. 356;
Garfield v. Wilson, 74 Cal. 175;
Perri v. Beaumont, 91 Cal. 30-3;
Youle v. Thomas, 146 Cal. 537.

In the case last cited, Thomas was the purchaser; Youle, the contestant; Clark, an applicant to purchase subsequent to the reference of the contest to the court. In the ensuing action Clark filed a complaint in intervention in the pending case, which was dismissed by the court; and upon the trial, Youle abandoned the case. There remained, therefore, as the only parties

interested in the case, Thomas and the state; and, as the only question for the court to determine, the question as to *the right of Thomas to purchase from the state*; which was adjudged in his favor. As the decision seems to us to dispose of all the questions here involved, we will quote from the opinion, so far as bearing upon the salient points of the question:

"The sole object to be achieved by the trial before the Superior Court is a determination of the question of the rights of the two parties between whom the contest arose in the surveyor-general's office to purchase the particular tract of land in question."

"When the judgment of the Superior Court is given, the state has, by its legislative action embodied in the statute, declared *that its officers are bound by the judgment of the court*, and that the patent must issue to the particular one of the persons who made the original contest in the surveyor-general's office and adjudged to have the right.

"There was here no attempt to adjudicate anything except the single question whether W. E. Youle or Mary J. Thomas has the right to make the purchase. This was the only question the court had authority to determine, and the only question it did determine. * * *

"By that judgment the state is bound."

The language of the court in other cases is equally expressive. Thus, in *McFaul v. Pfankuch*, 98 Cal. 402, it is said:

“The order made by the surveyor-general is in the nature of a bill of interpleader, and *binds the state by the result of the action*, in which each of the applicants to purchase becomes an actor and *must establish his right to purchase* to entitle him to judgment.”

In *Lobree v. Mullen*, 70 Cal. 150, the language of the court is:

“The state has consented by the statute that the judgment shall determine which of the two contestants shall receive the certificate of purchase, and *the judgment, to the full extent of its scope and purpose, is binding on all the world.*”

In this case, it will be noted, the defendant Mullen was a non-resident and was served by publication; and the question was, Whether the case came within the decision of *Pennoyer v. Neff*? In considering this, the question was necessarily considered, as to the nature of the action,—whether *in rem* or *quasi in rem*, or merely personal; and the court said:

“Whether the proceeding is *ad rem* strictly or not, the applicant has subjected himself in advance to the mode of deciding his right to purchase provided by the statutes,” etc.

In *Cunningham v. Shanklin*, 60 Cal. 118, the question was: Whether, after the reference of a contest, a new application could be entertained

for the land involved, and it was held to the contrary, the court saying:

"But are the officers of the state estopped thereby from selling the same land to an applicant who filed his claim pending the action brought to determine the contest or subsequent thereto? This question must be answered in the affirmative."

Obviously, the meaning of this is, that the officers of the state will be estopped by the judgment in the case when rendered, and that in the meantime they are estopped by the pendency of the action from entertaining a new application for the land.

In this case also the question was mooted as to the nature of the action, whether *in rem* or otherwise, but the court said:

"We are not prepared to say that the proceeding under the statute in question is a proceeding in rem, although it may bear some resemblance to such proceeding."

It may, however, be submitted that the proceeding is *quasi in rem*. For though the suit is not nominally against the land, as in an admiralty or revenue case, yet the judgment is in effect "against the specific thing"; that is to say, it has the same effect as the judgment in an admiralty or revenue case; where the judgment is nominally against the thing, but really against all the parties having an interest therein. So the proceeding in a contest case, is, to

determine "the legal condition or relation of a particular person." For its effect is to determine the "relation" of the prevailing party to the state as vendee; or, in other words, to establish the existence of a relation between the state and prevailing applicant, as parties to a valid subsisting contract, conferring upon the applicant a right to a conveyance of the land, and imposing upon the state the obligation to convey it.

It will be noted that, in the above cases, there is some divergence in the mode of expression—but the effect is always the same. Thus, in *Cunningham v. Shanklin* and *Youle v. Thomas*, it is said, the "officers" of the state are estopped; and this will include not only the register and surveyor-general, but the governor, all of whom are concerned in the issue of the patent. But in *Youle v. Thomas* it is also said, in terms, "*The state is bound,*" and to the same effect in *McFaul v. Pfankuch* and *People v. Morris*; and in *Lobree v. Mullen* it is said "*the judgment is binding on all the world.*"

Independently of the interpretation the Supreme Court of the state has thus put upon these statutes by repeated decisions, we submit that this court must, from its own consideration of these provisions, accord to them the same effect, as requiring an adjudication binding upon the state as well as the contestants formally

named as parties to the proceeding. Certainly, if regard is had to the object of the law and the mischief which it was intended to remedy, this interpretation of its effect will be found as necessary as it is reasonable. Under the prior law it devolved upon the surveyor-general to determine every question of law and fact involved in the application to purchase, and with regard to questions of fact, the decision of the officer, as to the matters within his authority, was conclusive. But with regard to questions of law, his decisions were subject to review by courts of equity at the suit of the losing party (*Buckley v. Howe*, 86 Cal. 596, and cases cited); and, in some exceptional cases, the patent could be attacked collaterally by the state, or by a party in possession, or in privity with the state or federal government.

Hence, under the old law the patent of the state did not vest in the patentee an assured right, but left his title open to litigation, not only in a court of equity, but also in a court of law. It was therefore not only defective as a muniment of title, but unnecessarily so. For this was an evil that could be easily remedied, to a very large extent, by providing for the final determination of questions both of fact and of law between the parties, and between the prevailing party and the state.

We submit, then: That the uncertainty of the

title in this regard was the principal mischief or evil existing prior to the amendment of the law; that this evil could not be effectually remedied except by providing that all litigation as to the legal title, and so far as practicable as to the equitable title, should be finished pending the application, so that the patent should confer a perfect legal title; that this was the actual intention of the legislature in enacting those provisions; and, finally, that it is so expressed in the provisions of the statutes (sections 3414, 3415 and 3416 of the Political Code), which have in effect been so construed by many concurring authorities:—thus remedying an obvious and glaring defect of the law, and effectuating the remedy.

It may be added, that it was a necessary part of the remedy, for the protection both of the state and its citizens, that there should be substituted for the quasi-judicial functions or jurisdiction of executive officers, unversed in the law, the wider jurisdiction, and the trained wisdom and knowledge of the courts of general jurisdiction. The District Court was such a court of general jurisdiction; its powers were defined by the Constitution of 1849 (Art. VI, Sec. 6), in force when these statutes were adopted, as follows:

“The district courts shall have original jurisdiction in all cases in equity; also, in

all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars; and also in all criminal cases not otherwise provided for. The district courts and their judges shall have power to issue writs of habeas corpus, on petition by or on behalf of any person held in actual custody, in their respective districts."

We do not forget, of course, that the learned court below, by its opinion in the case at bar, declared that these statutory provisions did not authorize a judgment binding upon the state. But this is manifestly a question which, under the doctrine of the decisions of this court already cited, is to be determined by this court unhampered by the judgment of the state court, because of the manner in which that question is presented in this case.

Moreover, it is to be remembered that the present case is the first in which the court below has decided that the state is not bound by the judgment which the statute expressly declares shall control the action of the state's officers charged with the administration of its public lands. In support of the decision now rendered one prior case is cited wherein a *dictum* to the same effect was delivered, but the only point in

judgment was whether, upon the death of the contestant-plaintiff his administrator had a right to continue the action, all rights of such plaintiff to the land having terminated with his death. Besides, this cited case (*Polk v. Sleeper*, 158 Cal. 632) was decided long after the contest-judgment here involved had been rendered.

On the other hand, several of the decisions which we have cited in support of our construction of the statute were rendered prior to the institution of the contest action in which the right of purchase was adjudicated to the predecessor of plaintiffs in error. From one of those prior decisions we have already quoted the comprehensive definition there given of the jurisdiction conferred upon the court in such a contest proceeding.

Hinckley v. Fowler, *supra*, 43 Cal. 56.

The language of another and even earlier case, already cited, is equally significant as exemplifying the construction which had been given to this statutory provision even before our predecessor made his application to purchase, and on which, therefore, he was entitled to rely when he submitted his claims to adjudication thereunder. The question in the case referred to concerned more directly the grounds and effect of contests before the surveyor-general, but this reasoning applies with even greater force to contests referred to the court under the same section of the statute. We therefore quote:

"The object of the act, as expressed in its title, is to provide for the sale of lands belonging to the state. In order to effect this object, it is of primary consequence to ascertain what land belongs to the state. When application is made for the purchase of any given parcel of land, it is of first importance, alike to the interest of the purchaser and the state, to ascertain whether such land is subject to selection and location by the state. If it is not, the state can neither pass the title, nor can the applicant acquire any by the proposed action. It would be folly, therefore, on the part of the state, and the purchaser, to avoid any contest which might throw light upon the question of title. Clearly it is the policy of the act in question to invite rather than discourage contests of this kind. The state can gain nothing by selling land to which she has no title, and to decline a contest involving that title, from whatever quarter it may come, would be practicing a species of fraud upon her own citizens, for by such a course it may not unfrequently happen that she will sell land that does not belong to her, and involve the purchaser in litigation more costly than the land itself, to which its loss may be superadded. In our judgment, it is made the duty of the surveyor-general to hear and determine all contests which may be brought before him touching *the right of the state to sell, or the applicant to purchase*, in the manner prescribed in the twenty-seventh section of this act."

Tyler v. Houghton, 25 Cal. 26, 30.

Several applications were made for the purchase of the land here in controversy. The contest over the right to purchase that land thus arising was referred for decision to the district court, by order of the surveyor-general, pursuant to the statutory provision whose construction we have above shown. This order was made on February 20th, 1878, and the complaint in the action before the court was filed, in accordance with that order and the governing statute, on April 19th, 1878 [Record, p. 93]. Final judgment in the action, decreeing the right to purchase the land here in question to be vested in Phineas Banning, predecessor of plaintiff in error, was rendered and entered on November 29, 1879 [Record, p. 97]. The Constitution of 1879, enacting the prohibition against the sale of tide lands on which the judgment in the case at bar is mainly founded, did not take effect until January 1st, 1880 (Constitution of California, Article XXII, Sec. 12, Appendix, p. 40.)

Thus it will be manifest that at a considerable period of time before the constitutional prohibition became operative, the right of the applicant for this land to purchase the same, according to the law in force when his application was made, had been consummated, and established by an adjudication of that right binding upon the state of California and all its officers, as

well as upon all other applicants for the purchase of the same land. Thereafter, as required by that judgment and the statute, the original application, made in 1866, under the Act of 1863, as well as the amendatory application made in 1878, was approved by the surveyor-general [Record, p. 91]; and payment having been made in due course, the patent of the state to the land in suit was issued to the original applicant, Phineas Banning [Record, p. 92]; and the title thus granted has passed by mesne conveyances to the plaintiffs in error.

To hold, therefore, that this adjudicated right of purchase was destroyed by the Constitution subsequently taking effect would not only impair the obligation of the state's contract, conclusively established by the judgment of its court in exercise of a jurisdiction explicitly conferred by its statutes, but would also deprive the applicant (to whose title plaintiffs in error have succeeded) of the right of property which became vested in him by the necessary effect of that judgment. The one result is plainly contrary to the provisions of Article I, section 10, of the federal Constitution; the other is equally violative of the provisions of section 1 of its Fourteenth Amendment.

"It is not within the power of a legislature to take away rights which have once been vested by a judgment. Legislation

may act on subsequent proceedings, may abate actions pending, but *when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.*"

McCullough v. Virginia, 172 U. S. 102,
123;

United States v. Klein, 13 Wall. 128, 20
L. Ed. 519.

On this ground, therefore, as well as on the ground previously urged, that a binding contract with the state was created upon the acceptance of its offer to sell, through the filing of application to purchase and the expenditures incurred on the faith of the state's offer, and as a necessary condition of accepting it in the prescribed mode:—On each of these independent grounds we submit that the judgment of the learned court below was contrary to the dictates of the Federal Constitution and must be reversed.

Respectfully submitted,

JAS. A. GIBSON,

Attorney for Plaintiffs in Error.

EDWARD E. BACON,

Of Counsel.

APPENDIX.

A.

**AN ACT TO PROVIDE FOR THE SALE OF CERTAIN
LANDS BELONGING TO THE STATE.**

(Approved April 27, 1863; Stats. Cal. 1863,
pp. 591-601.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Swamp and Overflowed Land Sale. How payable.

Section 1. The swamp and overflowed, marsh, and tide lands, belonging to the state, shall be sold at the rate of one dollar per acre, in gold or silver coin, payable: twenty per cent of principal within thirty days of the record of approval of survey or location, by the surveyor-general, in the county surveyor's office; the balance, bearing interest at the rate of ten per cent per annum, payable annually in advance, computed from the date of such approval, shall be due and payable one year after the passage of any act requiring such payment, or before, if desired by the purchaser. * * *

Oath of Purchaser and Application.

Sec. 3. Whenever any resident of this state desires to purchase any portion of the swamp and overflowed lands granted to the state by

Act of Congress of September twenty-eighth, eighteen hundred and fifty, or any portion of the tide lands belonging to the state by virtue of her sovereignty, he shall make affidavit before any person competent to administer oaths, that he is a citizen of the United States, or has filed his intention of becoming a citizen, is a resident of the state, and of lawful age, that he desires to purchase said lands (describing them) under the laws of the state providing for the sale of the swamp and overflowed and tide lands of the state, and that he has not entered under said laws any other land which, together with the land sought to be purchased, shall exceed six hundred and forty acres, and that he does not know of any legal or equitable claim to said land other than his own, and also, if the applicant be a female, that she is entitled to purchase and hold real estate in her own name under the laws of this state, which application and affidavit shall be filed in the office of the surveyor of the county in which such lands, or the greater portion thereof, are situate. * * *

Duties of County Surveyor.

Sec. 7. It shall be the duty of the county surveyor, immediately upon receiving any application for a survey required by sections three and four of this act, to note the same in a book kept in his office for the purpose, in the regular

order in which it is received, giving the name and address of the applicant, description of the land, class of lands, whether swamp, tide, sixteenth and thirty-sixth section grant, or lands in lieu thereof, which book shall be furnished by the surveyor-general, and shall always be open to public inspection. He shall, within thirty days after receiving such application, if the lands are subject to sale, complete the survey, plat, and field notes, duplicates of which, together with a copy of the application and affidavits, shall, if the lands be swamp and overflowed, or tide lands, be forwarded to the surveyor-general for approval; and if the lands be part of the sixteenth and thirty-sixth section grant, he shall furnish the applicant with a full description, by legal subdivision, of the lands applied for, which, together with the application and affidavits required by section four of this act, shall be filed with the locating agent of the district in which the lands are situate. The county surveyor shall, immediately upon the receipt from the surveyor-general of any approved copy of survey of swamp or tide lands, forward the same to the applicant, and mark upon the maps and record in the books of his office all surveys thus made by him, which maps and books shall be always open to public inspection.

Duties of Locating Agents.

Sec. 8. It shall be the duty of the several state locating agents of this state, whenever application is made to them, as provided in sections five, six and seven of this act, for the purchase of any lands of this state, except swamp and overflowed and tide lands, if the lands applied for be subject to sale, to keep a complete record of such applications, when accepted, in the same manner as provided for county surveyors in section seven of this act, which record shall always be open to public inspection. Whenever the amount of three hundred and twenty or more acres have been applied for under any one grant, he shall, in behalf of the state, make application to the register of the United States Land Office for the district, for such lands, in part satisfaction of the grant under which they are located, and obtain his acceptance of the selections, which acceptance, together with the corresponding certificates of location, according to the form prescribed by the surveyor-general, he shall forward, with the proper affidavits, to the office of the surveyor-general for approval, and when approved and returned to him, he shall record the approval, and forward the approved certificate of location to the applicant.

Duties of Surveyor-General.

Sec. 9. It shall be the duty of the surveyor-general, upon the receipt of any application to purchase any lands of the state, to carefully compare the same with the maps and records of surveys and locations in his office, and if the law under which such survey or location was made has been complied with, and no counter-application or conflict exists, he shall, at the expiration of thirty days, approve the same, and forward a copy, with his approval indorsed thereon, to the county surveyor, if the lands be swamp and overflowed, and to the state locating agent, if for any other class of lands. The surveyor-general shall keep at his office complete maps of the state, so far as surveys have been returned to him, upon which shall be shown all the lands sold by the state, and all surveys of lands applied for, which have been approved by him, showing, also, all lands for which certificates of purchase or patents have been issued. * * *

State Land Office.

Sec. 11. For the purpose of ascertaining, protecting, and managing the title and claim of the state to any lands within its limits, derived by grants from the United States, or in any other manner, and for the purpose of carrying out the laws which have been or may hereafter be

enacted for the disposal of the same, an office shall be established at the seat of government, which shall be designated and known as the state land office of the state of California.

Register.

Sec. 12. The chief officer of said land office shall be designated and known as the "register of the state land office," and his duties shall be such as may be prescribed by law. The surveyor-general shall be *ex-officio* said register until otherwise provided by law; but before entering upon the duties of his office, the register shall take an oath for the faithful performance of his duties, and to support the Constitution of the United States and of this state; and the said surveyor-general and register shall have power to appoint, under his hand and seal, a deputy, who may, when necessary, perform all duties belonging to the two offices; and for his own security the surveyor-general and register may require said deputy to give him a bond in such sum and with such securities as he may deem sufficient; but the said deputy shall be entitled to no compensation from the state for acting in such capacity.

Duty of Register.

Sec. 13. It shall be the duty of the said register to keep separate and distinct accounts

and records in relation to each class of lands to which the state may be entitled. He shall keep, in a well-bound set of books, complete records of all lands that may have been or may hereafter be selected and located by the proper agents of the state as a portion of the five hundred thousand acres granted to the state, and applied to school purposes, * * * He shall also keep, in a well-bound set of books, a complete record of all swamp and overflowed lands, and tide lands, to which the state is entitled by virtue of any Act of Congress, or by her own sovereignty, in the same manner as already prescribed in the case of school, seminary, public building, and agricultural college lands. He shall also keep the proper plats of the above-named lands, upon which plats all approved locations and surveys shall be designated by their numbers; and when certificates of purchase or patents shall have been issued, the same shall be also noted on the plats. But so long as the surveyor-general performs the duties of register, but one set of maps shall be required.

Approved Surveys, etc.

Sec. 14. Whenever any location or survey of any of the above-mentioned lands has been approved by the surveyor-general, in the manner hereinbefore specified, the purchaser shall present his copy of the same to the county treas-

urer, who shall thereupon receive the amount, whether in full or in part, so provided by law, and the fee for the certificate of purchase, indorsing his receipt therefor upon the back of the said certificate of location or survey, which shall then be returned to the purchaser. All subsequent payments, whether of the balance of the principal or of the interest thereon, shall be paid to the county treasurer in like manner, who shall indorse the same upon the back of the certificate of purchase. The treasurer shall also direct the purchaser to take the said certificate of location or purchase or survey so indorsed, to the auditor, who shall charge the amount named therein to the account of the treasurer, and make his check upon the indorsed receipt so charged. * * *

Certificate of Purchase.

Sec. 17. When a certificate of purchase has been issued by the register, the same shall be deemed *prima facie* evidence of legal title to the land for which the certificate of purchase is issued; *provided*, such certificates of purchase shall not be so construed as to affect the working of mineral lands for mining purposes. Such certificates, and all rights acquired thereby, shall be subject to sale and transfer, by deed or assignment, executed and acknowledged before any officer authorized by law to take acknowl-

edgments of deeds, or before said register; but all such sales or transfers shall, when recorded by the county recorder, be reported by him to the register, to be entered in the books of his office, and the said recorder shall be entitled to receive from the purchaser or transferee, for so reporting the same, a fee of fifty cents in addition to that already allowed for recording. * * *

Sec. 21. A second certificate of purchase shall not in any case be issued for the same tract of land, unless the first certificate shall have been surrendered, or shall have been annulled in the manner prescribed by law.

Final Payment. Issuance of Patent.

Sec. 22. When any final payment shall have been made for any tract sold by the state, which is situated upon lands which have been surveyed by the United States, and the selection of which has been duly accepted by and all papers required by law duly procured from the proper officer of the government, or when the tract so finally paid for shall be swamp or tide lands, it shall be the duty of the register of the land office to prepare a patent for said land, and send the same to the governor of the state, together with a certificate under his official seal, certifying that the laws relating to the particular case have been fully complied with, or that

full payment has been made to the state, and that the party named in the patent is entitled to the same. The governor shall then complete and issue the patent, conveying to the party named the lands described in the body of the patent, which shall then be signed by the governor, sealed with the seal of state, and attested by the secretary of state. The register shall then record the patent in the proper record book of his office, and countersign and deliver or forward the patent to the owner or his agent.

Seals of Register and Surveyor-General.

Sec. 23. The register and surveyor-general shall each have a seal of office, which they shall attach to all certificates issued by them, and any copies or extracts of any documents, or papers, or records, belonging to his office, duly authenticated by him under his said seal, shall have the same effect and efficiency in the courts of the state as the originals would have. * * *

Powers of Officers.

Sec. 25. The surveyor-general, register, county surveyors, and agents, authorized by law to locate state lands, shall each have power to administer the oaths or affirmations required or allowed by law in matters touching the duties of his office, and for no other purpose. * * *

Surveyor-General and Register.

Sec. 27. The surveyor-general and register are hereby authorized to issue all the necessary instructions, and to prepare and order the printing of all the blanks needed for the proper fulfillment of the requirements of this act. In all cases where a contest shall arise for the approval of a survey or location before the surveyor-general, or for a certificate of purchase, or other evidence of title, before the register, that officer shall, when such contest is a question as to the survey, or purely a question of fact, determine the same according to the facts, and give his approval, or issue the certificate of purchase, or other evidence of title, as he may so determine. When, in the judgment of the surveyor-general or register, a question of law alone, or of law and fact, is involved in such case, or when either party shall demand a trial of such question in the courts of this state, the said surveyor-general or register shall enter such demand, with a statement of the case, together with a direction that the parties are referred to the District Court of the proper district for a final determination of such conflicting claim or contest, in the proper record book of his office. Either party may bring his action in the District Court of the county in which the land in question is situated, to determine such

conflicting claim; and the proffer of a certified copy of the entry, made by the surveyor-general or register, shall give to said District Court full and complete jurisdiction to hear, try, and determine said conflicting claims. Upon the filing with the surveyor-general or register a copy of the final judgment of said District Court, the officer shall give his approval, or issue the certificate of purchase, or other evidence of title, in accordance with such judgment.

Oath of Purchaser.

Sec. 28. No location of land made under the provisions of this act, or any proceedings in accordance therewith, shall be construed to give any title to, interest in, or right of possession or occupation of any of the public lands in this state, unless the person for whose benefit the location is made or the proceedings taken shall have first taken and subscribed the following oath or affirmation:

“I do solemnly swear (or affirm, as the case may be) that I will support, protect, and defend the Constitution and government of the United States against all enemies, whether domestic or foreign; that I will bear true faith, allegiance, and loyalty to the said Constitution and government, any ordinance or law of any state, convention, or legislature, or any rule or obligation of any society or association, or any decree or

order from any source whatsoever, to the contrary notwithstanding; and that I will support the Constitution of the state of California; and, further, that I do this with a full determination, pledge, and purpose, without any mental reservation or evasion whatsoever, and that this oath (or affirmation, as the case may be) is not taken for the purpose of acquiring title to, interest in, or possession of any land in order that such title, interest, or possession may be transferred to any person or persons, to enable such person or persons to evade the provisions of any law of the state of California, or any regulation of the general land office at Washington."

Certificate of Oath to Be Indorsed, etc.

Sec. 29. The certificate of the oath or affirmation prescribed in the preceding section shall be indorsed on a description of the land over which ownership or control is sought to be acquired, setting forth when the land has been surveyed by the general government, the section and subdivision of section, township, and range, in which such land is situated, and the said description, with the certificate of the oath or affirmation indorsed as prescribed by this section, shall be filed in the office of the recorder of the county in which the land described is situated, and the right of the person making the oath or affirmation shall not be deemed to at-

tach to such land by virtue of any proceedings under this act until the moment of the filing the description and certificate of the oath or affirmation in the office of the county recorder, and no certificate of purchase or patent shall be issued to any person for lands located under this act until a certified copy of said description and oath of affirmation has been filed in the office of the state register.

Act Not to Apply to Certain Lands.

Sec. 30. This act shall not apply to the marsh and tide lands upon the city front and within five miles of the city and county of San Francisco, and of the city of Oakland, and one mile of the state prison at San Quentin.

Sec. 31. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

B.

AN ACT TO PROVIDE FOR THE MANAGEMENT
AND SALE OF THE LANDS BELONGING TO
THE STATE.

(Approved March 28, 1868; Stats. Cal. 1867-8,
pp. 507-530.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

PART I. GENERAL POWERS AND DUTIES OF
OFFICERS.

State Land Office. Chief Officer.

Sec. 1. For the purpose of managing and selling any lands, the title of which is now or may hereafter be vested in the state by reason of any grant from the United States, or to which the state is or may be entitled by virtue of her sovereignty, an office shall be established at the seat of government, to be designated and known as the state land office of the state of California, the chief officer of which shall be known and designated by the title of register of the state land office, and his duties shall be such as may be prescribed by law.

Deputies.

Sec. 2. The surveyor-general of the state shall be *ex-officio* register until otherwise provided by law; and the said surveyor-general and register shall have the power to appoint a deputy, who may, when necessary, perform all the duties pertaining to the two offices; but said deputy shall receive no compensation as such; *provided*, that the surveyor-general shall have power to appoint any number of deputies necessary to perform all the field work required by law, and shall have the right to exact bonds of such deputies.

Duties of Register.

Sec. 3. It shall be the duty of the said register to keep separate, distinct and complete accounts and records in relation to each class of lands to which the state is or may be entitled; which accounts and records shall show the number of the survey or location, the date of the approval, the number of the locator, the description of the lands, by township, range, section and subdivision of section; the price per acre at which the same are sold, the amount paid, the date of said payment, the number and date of the certificate of purchase, and the date of the patent when the same shall have been issued. He shall also keep the proper plats of the above-named lands, upon which all approved locations and surveys shall be designated by their numbers; and when certificates of purchase or patents shall have been issued, the same shall also be noted on the plats. But so long as the surveyor-general performs the duties of register, but one set of maps shall be required.

Issue Certificates.

Sec. 4. Whenever the register shall receive from the county treasurer of the proper county a statement showing that any applicant for any state lands has made the first payment of principal and interest, as hereinafter provided, he shall issue to the person or persons entitled

thereto a certificate of purchase, which shall show the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest shall be computed, the amount paid and the amount remaining unpaid; which certificate shall be received in any court of justice in this state as *prima facie* evidence of title.

Prepare Patents. Lands in Lieu of 16th and 36th Sections. Record.

Sec. 5. Whenever final payment shall have been made for any tract of land sold by authority of the state, the selection of which shall have been duly accepted and approved by the proper United States authorities, or when the tract so finally paid for (or reclaimed as hereinafter provided) shall be swamp and overflowed, salt marsh or tide lands, it shall be the duty of the register of the state land office, upon the surrender of the certificate of purchase by the person or persons entitled to the same, to prepare a patent for said land and send the same to the governor, together with a certificate, under his official seal, certifying that the laws in relation thereto have been fully complied with, that payment in full has been made to the state, and that the party named in the said prepared patent is entitled to the same. The patent shall then be signed by the governor, attested by the

secretary of state, sealed with the great seal of the state, and countersigned by the register of the state land office; * * * and *provided* further, that no patent for lands taken in lieu of sixteenths and thirty-sixth sections shall issue until the land (shall) first have been relinquished to the state by authority of the general land office of the United States. The register of the state land office shall record all patents in books to be kept in his office for that purpose, and shall then forward or deliver the same to the owners of the land or their agents. * * *

Seal of Office.

Sec. 7. The register of the state land office shall have a seal of office, which he shall affix to all certificates issued by him; and any copy or extract of any document, paper or record belonging to his office, duly authenticated by him under his hand and seal, shall be received in evidence in all the courts of justice in this state, in place of, and have the same force and effect, as the originals, if produced.

Salary and Fees.

Sec. 8. The register of the state land office shall receive a salary of two thousand dollars per annum, payable the same as other state officers are paid; and he shall be entitled to demand and receive the following fees; For each certifi-

cate of purchase, duplicate or patent, three dollars; for certifying a contested case to District Court, ten dollars; for copies of papers in his office, fifteen cents per folio and fifty cents for the certificate with the seal attached; and such other fees as may be allowed by law. All fees received by the register shall be paid into the state treasury. * * *

Surveyor-General to Examine Surveys.

Sec. 10. It shall be the duty of the surveyor-general to examine all surveys made under the provisions of this act, and, if found correct, approve and return the same without delay to the county surveyor making the same. * * *

Instructions and Blanks.

Sec. 16. The surveyor-general and the register are each hereby authorized and required to issue all necessary instructions and to prepare and order printed all the blank forms necessary for the proper and complete operation of this act.

When Approval of Survey or Location is Contested. District Court to Have Jurisdiction.

Sec. 17. In all cases where a contest shall arise concerning the approval of a survey or location before the surveyor-general, or concerning a certificate of purchase or other evidence

of title before the register, the officer before whom the contest is made may, when the question involved shall be as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp, or on overflowed lands of the state, or whether the same is included in any established and confirmed grant, the lines of which have been run by due authority of law, proceed to hear and determine the same; but when, in the judgment of the officer before whom the contest shall arise, a question of law is involved, or when either party shall demand a trial in the courts of the state, he shall make an order referring said contest to the District Court of the county in which the land involved in the contest is situated, and shall enter said order in the proper record book of his office; *provided*, that the party protesting against the approval of a survey or location, or the issuance of a certificate of purchase or other evidence of title shall in all cases make a sufficient *ex parte* showing to warrant, in the judgment of the surveyor-general or register, further proceedings in the matter, and shall prosecute his contest to judgment within six months from the date of the protest, unless for cause satisfactory to the surveyor-general, the register or the court. Either party may bring an action in the District Court of the county in which the land in question is situated, to determine such con-

flict, and the proffer of a certified copy of the entry, made by either the surveyor-general or the register, shall give said District Court full and complete jurisdiction to hear and determine said conflict; and upon the filing with the surveyor-general or register, as the case may be, of a copy of the final judgment of said court, that officer shall give his approval of the survey or location, or issue the certificate of purchase or other evidence of title, in accordance with said final judgment.

Duties of County Surveyor.

Sec. 18. It shall be the duty of the county surveyor, immediately upon receiving an application for any survey required by this act, to indorse the date of the receipt thereon, and note the same in a book to be furnished by the surveyor-general and kept in his office for that purpose, in the regular order in which it is received, giving the name and address of the applicant, and the description of the land by township, range, section and subdivision of section, which book shall always be open for public inspection. He shall, within thirty days after receiving such application, if the lands are subject to sale, complete the survey, plat and field notes, which shall be recorded by him in a book kept in his office for that purpose; and duplicate copies thereof, together with a copy of the application,

shall be forwarded to the surveyor-general for approval. The said county surveyor shall, immediately upon the receipt of an approved survey, record said approval; he shall mark all approved surveys upon the maps of his office, and all his said books and maps shall at all times be open to public inspection.

Surveys to Conform to U. S. System.

Sec. 19. All surveys made under the provisions of this act shall be according to the instructions of the surveyor-general, and shall be made according to the rectangular system adopted by the United States in the survey of the public lands, and shall conform, as near as practicable, to the lines of the public surveys; *provided*, that in salt marsh or tide land surveys the surveyor-general may order a departure from said system.

If County Surveyor Delinquent.

Sec. 20. Whenever any county surveyor shall neglect or refuse to make any survey of state lands as provided in this act, or in case of a vacancy in the office of county surveyor, the surveyor-general may, when requested by an applicant for the purchase of lands, appoint some competent person to make said survey, and when approved, shall be as valid as if made by the county surveyor. * * *

Oaths.

Sec. 22. The surveyor-general, the register and county surveyor, shall each have power to administer the oaths or affirmations required in matters pertaining to their respective offices.

Purchasers to Make Payments.

Sec. 23. Whenever any survey or location of any state lands shall have been made or approved by the surveyor-general, the purchaser shall, within fifty days from the date of said approval or location, present his copy of the same to the county treasurer, who shall thereupon receive the amount, whether in full or in part, so provided by law, and the fee for the certificate of purchase, indorsing his receipt therefor upon the back of the said certificate of location or survey, which shall then be returned to the purchaser. All subsequent payments, whether of the balance of the principal or of the interest thereon, shall be paid to the county treasurer in like manner, who shall indorse the same upon the back of the certificate of purchase. The treasurer shall also direct the purchaser to take said certificate of location, or purchase, or survey, so indorsed, to the auditor, who shall charge the amount named therein to the account of the treasurer, and make his check upon the indorsed receipt so charged.

Reports of County Treasurers.

Sec. 24. Upon the first day of every month (except the same shall fall on Sunday or other holiday, then on the day following) the county treasurer shall make a report to the register of the state land office of all moneys received for land during the preceding month, which shall show the number of the location or survey, the name of the purchaser and the amount paid since the date of his last report, whether as principal or interest, which amounts shall be entered in the columns belonging to the particular class of land upon which each payment has been made. The payment of the fee for the certificate of purchase shall also be entered in the proper column, and the treasurer shall then send the report to the auditor, who shall compare the items with the account of the treasurer; and if the same shall be found to agree with his entries he shall countersign the report as correct and return it to the treasurer. These reports shall be forwarded to the register on or before the fifth day after they have been made up, and upon receipt thereof the register shall enter the payment so reported to the credit of the purchasers by whom they have been made, in the books of his office. He shall further, as soon as possible thereafter, notify the county treasurer of the receipt of his report, and of any

error that may have been found therein—in that case returning the report for correction.

Swamp Land Fund.

Section 25. At the end of the quarter it shall be the duty of the county treasurer to make a report to the controller of state, showing the amount which has been received during the quarter, either as principal or interest, upon each class of land; which report shall be referred to the register of the state land office for examination and comparison with the books of his office. When the register shall have certified to the correctness of the report it shall be returned to the controller, who shall thereupon make his settlement with the county treasurer; and the said county treasurer shall then pay over to the treasurer of state all moneys, controller's warrants or other indebtedness of the state that he may have received in payment for said lands; *provided*, that the county treasurer shall retain in his own hands all moneys arising from the sale of swamp and overflowed lands and shall place the same to the credit of a fund to be known as the "Swamp Land Fund" of the county; and the same shall be subject to the order of the board of supervisors, except as may be hereinafter provided.

Interest.

Sec. 26. The treasurer shall compute interest on all lands from the date of the approval of the survey, or the date of such certificate of location, to the first of January following such date; or if for lands already purchased, then up to the first of January following the day upon which the interest falls due; after which time all payments of principal or interest shall fall due on the first day of January.

PART II. SWAMP AND OVERFLOWED, SALT
MARSH AND TIDE LANDS.

Price per Acre.

Sec. 28. The swamp and overflowed, salt marsh and tide lands belonging to the state shall be sold at the rate of one dollar per acre in gold coin, payable, twenty per cent of the principal within fifty days from the date of the approval of the survey of the surveyor-general; the remainder of the principal shall be due and payable one year after the passage of any act of the legislature requiring such payment, or before, if desired by the purchasers; *provided*, that legal interest thereon be paid annually, in advance, from the date of such approval; *provided*, the bonds or warrants of districts having an outstanding indebtedness shall be received in payment for lands in such district at par.

Application to Purchase—Survey—Preferred Purchasers.

Sec. 29. Whenever any resident of this state desires to purchase any portion of the swamp and overflowed lands granted to the state by Act of Congress of September twenty-eighth, eighteen hundred and fifty, or any portion of the tide lands belonging to the state above low tide, he shall make affidavit, before any person competent to administer oaths, that he is a citizen of the United States, or has filed his intention of becoming a citizen; is a resident of the state, and of lawful age; that he desires to purchase said lands (describing them) under the laws of the state providing for the sale of the swamp and overflowed and tide lands of the state, and that he does not know of any legal or equitable claim to said land other than his own; and also, if the applicant be a female, that she is entitled to purchase and hold real estate in her own name under the laws of this state, which application and affidavit shall be filed in the office of the surveyor of the county in which such lands, or the greater portion thereof, are situate. The county surveyor shall, except when surveys have already been made, then make a survey of said lands, as provided in section eighteen of this act; *provided*, that applicants for sale marsh or tide lands which shall be less

than twenty chains in width, applying within ninety days after this act goes into effect, shall, in addition to the above, set forth in said affidavit that he or she is the owner or occupant of the uplands lying immediately back of and adjoining said lands sought to be purchased; *provided*, that the owner or occupant of any such upland shall not be a preferred purchaser for more than one-fourth of a mile front on any bay or navigable stream; and any such application by such owner or occupant made within said ninety days shall be only for one-fourth of a mile frontage as aforesaid.

* * * * *

PART IV.—MISCELLANEOUS PROVISIONS.

* * * * *

Death of Patentee.

Sec. 62. In all cases where patents for lands have been or may hereafter be issued, in pursuance of any law of this state or of the United States, to a person who has died or shall hereafter die before the date of such patent, the title to the land designated therein shall hereafter die before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee as if the patent had issued to the deceased person during life. * * *

Certificates Subject to Sale and Transfer. Fee.

Sec. 69. Certificates of purchase and all rights acquired thereby shall be subject to sale and transfer, by deed or assignment, executed and acknowledged before any officer authorized by law to take acknowledgments of deeds, or before said register; but all such sales or transfers shall, when recorded by the county recorder, be reported by him to the register, to be entered in the books of his office; and the said recorder shall be entitled to receive from the purchaser or transferee, for so reporting the same, a fee of fifty cents in addition to that already allowed for recording.

Lands Excluded.

Sec. 70. All the swamp and overflowed, salt marsh and tide lands within one mile of the state prison at San Quentin, within five miles of the city and county of San Francisco, and within five miles of the corporate limits of the city of Oakland, are hereby excluded from the provisions of this act; *provided*, that this act shall not be construed to authorize the sale of any lands below low tide.

Acts Repealed.

Sec. 71. (Certain other acts and parts of acts including the act approved May 27th, 1863, are repealed.)

“* * * *provided*, however, that the provisions of this act, shall not in any manner affect any legal or equitable claims, now existing on any of the lands hereinbefore described, in favor of any claimant under the state, nor affect any suit or proceeding which is now pending respecting the same, arising out of any claims now made; but the courts of the state may proceed and adjudicate upon said rights, and patents or other evidences of title may issue for the same to the parties entitled thereto, under any existing laws of this state, the provisions of this act to the contrary notwithstanding.

Sec. 72. Immediately after the passage of this act the state printer shall print two thousand copies of the same in pamphlet form, and deliver them to the register of the state land office for distribution to state and county officers.

C.

AN ACT TO AMEND AN ACT TO PROVIDE FOR
THE MANAGEMENT AND SALE OF THE
LANDS BELONGING TO THE STATE, AP-
PROVED MARCH TWENTY-EIGHTH, EIGH-
TEEN HUNDRED AND SIXTY-EIGHT.

(Approved April 4, 1870; Stats. Cal. 1869-70,
p. 877.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Section seventy is hereby amended as follows:

Lands Excluded.

Sec. 70. All the swamp and overflowed, salt marsh and tide lands within one mile of the state prison at San Quentin, within five miles of the city and county of San Francisco, within five miles of the corporate limits of the city of Oakland, and within two miles of any town or village, are hereby excluded from the provisions of this act; *provided*, that this act shall not be construed to authorize the sale of any land below low tide.

D.

POLITICAL CODE.

(Approved March 12, 1872.)

ARTICLE I.

GENERAL PROVISIONS RELATING TO THE PUBLIC
LANDS.

Contests. How Disposed Of.

Sec. 3414. When a contest arises concerning the approval of a survey or location before the surveyor-general, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or

overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the District Court of the county in which the land is situated, and must enter such order in a record book in his office.

Action in District Court. Jurisdiction.

Sec. 3415. After such order is made either party may bring an action in the District Court of the county in which the land in question is situated to determine the conflict, and the production of a certified copy of the entry, made by either the surveyor-general or the register, gives the court full and complete jurisdiction to hear and determine the action.

Effect of Judgment.

Sec. 3416. Upon filing with the surveyor-general or register, as the case may be, a copy of the final judgment of the court, that officer must approved the survey or location, or issue the certificate of purchase or other evidence of title in accordance with such judgment.

ARTICLE II.

SWAMP AND OVERFLOWED, SALT MARSH AND
TIDE LANDS.

*Swamp Lands, Overflowed, Salt Marsh and
Tide Lands. Price and Manner of Pay-
ment.*

Sec. 3440. The swamp and overflowed, salt marsh, and tide lands belonging to the state must be sold at the rate of one dollar per acre, in gold coin, payable, twenty per cent of the principal within fifty days from the date of the approval of the survey by the surveyor-general; and the balance, bearing interest at the rate of ten per cent per annum payable in advance, is due and payable one year after the passage of any act of the legislature requiring such payment, or before, if desired by the purchaser. Bonds or warrants of districts having an outstanding indebtedness are receivable in payment for lands in such district at par.

*Application for Purchase of Swamp and Over-
flowed, Salt Marsh and Tide Lands.*

Sec. 3443. Any person desiring to purchase swamp and overflowed or tide lands above low tide, must make an affidavit and file the same in the office of the surveyor-general of the state, that he is a citizen of the United States, or has filed his intention to become so, a resident of

the state, of lawful age; that he desires to purchase lands (describing them) under the law providing for the sale of swamp, and overflowed, and tide lands; that he does not know of any valid claim to the same, other than his own, and if the land is swamp and overflowed, that he knows the land applied for, and the exterior bounds thereof; and knows of his own knowledge that there are no settlers thereon, or, if there are, that the land has been segregated more than six months by authority of the United States, and that the land which he now owns (swamp and overflowed), together with that sought to be purchased, does not exceed six hundred and forty acres. (*Amendments, approved March 28, 1874; Amendments 1873-4, 140; took effect immediately.*)

No Claim Against Bona Fide Settlers.

An Act for the protection of settlers on public lands claimed by the state. Approved March 10, 1874; 1873-4, 327.

Section 1. From and after the passage of this act, no claim shall be made by the state to any land as swamp or overflowed, nor shall the same be segregated by authority of the state, for which pre-emption or homestead patents have been issued by the United States, or upon which there are settlers, occupying the land in good faith, who have filed their pre-emption or

homestead declaratory statement; nor shall the register of the state land office receive any application for swamp or overflowed land, unless the application be accompanied by a certificate from the register of the United States land office for the district in which the land is situated, that there is no pre-emption or homestead filing upon the land sought to be purchased.

Sec. 2. This act shall take effect and be in force from and after its passage.

Application, to Whom to Be Made.

Sec. 3445. Any person desiring to purchase lands as provided in section 3443 of this code, which have been segregated by authority of the United States, but which have not been sectionized by the same authority, must apply to the surveyor of the county in which the land is situated to have the land which he desires to purchase surveyed, and a certificate of such survey must be attached to the affidavit required for the purchase of lands, as provided in said section. All surveys required of county surveyors by the provisions of this section must conform as nearly as practicable to the system adopted by the United States for the survey of public lands. (Amendment, approved March 28, 1874; Amendments 1873-4, 141; took effect immediately.)

*Certain Lands Excepted from the Provisions of
This Chapter.*

Sec. 3488. All swamp and overflowed, salt marsh, and tide lands within one mile of the state prison at San Quentin, within the city and county of San Francisco, city of Oakland, or within five miles of the corporate limits of either, or within two miles of any incorporated city or town, are excluded from the operation of this chapter. The lands mentioned and described in an act to survey and dispose of certain salt marsh and tide lands belonging to the state of California, approved March thirtieth, eighteen hundred and sixty-eight, and in the act supplementary and amendatory thereto, approved April first, eighteen hundred and seventy, must be disposed of as in such acts provided, which are hereby continued in force.

ARTICLE IV.

PAYMENTS, CERTIFICATES OF PURCHASE AND
PATENTS.

Payments, How Made.

Sec. 3512. Whenever any survey or location has been made or approved, the purchaser must, within fifty days from the date of approval or location, present his copy of the same to the county treasurer of the county in which the land, or some part thereof, is situated, who must

receive the amount to be paid, and the fee for the certificate of purchase, indorsing his receipt therefor upon the certificate of location or survey, and returning it to the purchaser.

Failure to Pay to Work Forfeiture.

Sec. 3513. In case payment is not made within fifty days, the lands described in the survey or location revert to the state without suit, and the survey or location is void. All subsequent payments must be made to the county treasurer, in like manner, who must indorse the same upon the certificate. The treasurer must direct the purchaser to take the certificate so indorsed to the auditor, who must charge the treasurer with the amount received, and make his check upon the indorsed receipt.

Register to Issue Certificates of Purchase.

Sec. 3514. Whenever the register receives from a county treasurer a statement showing that an applicant for state lands has made the first payment, he must issue to the person entitled thereto a certificate of purchase, showing the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest is to be computed, the amount paid and the amount remaining unpaid, which certificate is *prima facie* evidence of title. (Amendments, approved March 30,

1874; Amendments 1873-4, 52; took effect July 6, 1874.)

Certificates of Purchase May Be Sold.

Sec. 3515. Certificates of purchase, and all rights acquired thereunder, are subject to sale, by deed or assignment, executed and acknowledged before any officer authorized by law to take acknowledgments of conveyances of real property, or before the register.

Sale to Be Recorded.

Sec. 3516. All such sales must, when the deed or assignment is recorded by the county recorder, be reported by him to the register, to be entered in the books of his office.

Register to Prepare Patents, When.

Sec. 3519. Whenever final payment has been made for any tract of land, the selection of which has been accepted and approved by the United States authorities, or when the tract finally paid for or reclaimed is swamp and overflowed, salt marsh, or tide lands, the register, upon the surrender of the certificate of purchase by the person entitled to the same, must prepare a patent for the land, and send it to the governor, together with a certificate that the laws in relation thereto have been complied with, that payment in full has been made, and that

the party named in the prepared patent is entitled to it.

Patent, How Executed.

Sec. 3520. The patent must then be signed by the governor, attested by the secretary of state, sealed with the great seal of state, and be countersigned by the register.

Patents to Be Recorded and Delivered.

Sec. 3522. The register must record all patents in books to be kept in his office for that purpose, and then deliver them to persons entitled thereto.

E.

CALIFORNIA CONSTITUTION.

(Adopted 1879.)

Article I, Sec. 14. "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner."

Article XV, Sec. 3. "All tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet, used for the purpose of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

Article XXII, Sec. 12. "This Constitution shall take effect and be in force on and after the fourth day of July, eighteen hundred and seventy-nine, at twelve o'clock meridian, so far as the same relates to the election of all officers, the commencement of their terms of office, and the meeting of the legislature. In all other respects, and for all other purposes, this Constitution shall take effect on the first day of January, eighteen hundred and eighty, at twelve o'clock meridian."

F.

UNITED STATES CONSTITUTION.

Article I, Section 10. "No state shall * * * pass any * * * law impairing the obligation of contracts.

XIV Amendment, Sec. 1. * * * "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3

Office Supreme Court, U. S.

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IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM 1914.

No. **368** **73**

**Banning Company, a corporation,
Mary H. Banning, Lucy T.
Greenleaf, Mary H. Norris, Han-
cock Banning and Pacific Elec-
tric Railway Company, a cor-
poration,**

Plaintiffs in Error,

vs.

**People of the State of California,
upon information of U. S. Webb,
Attorney General,**

Defendants in Error.

REPLY BRIEF OF DEFENDANTS IN ERROR.

U. S. WEBB,

Attorney General of the State of California, and

ALBERT LEE STEPHENS,

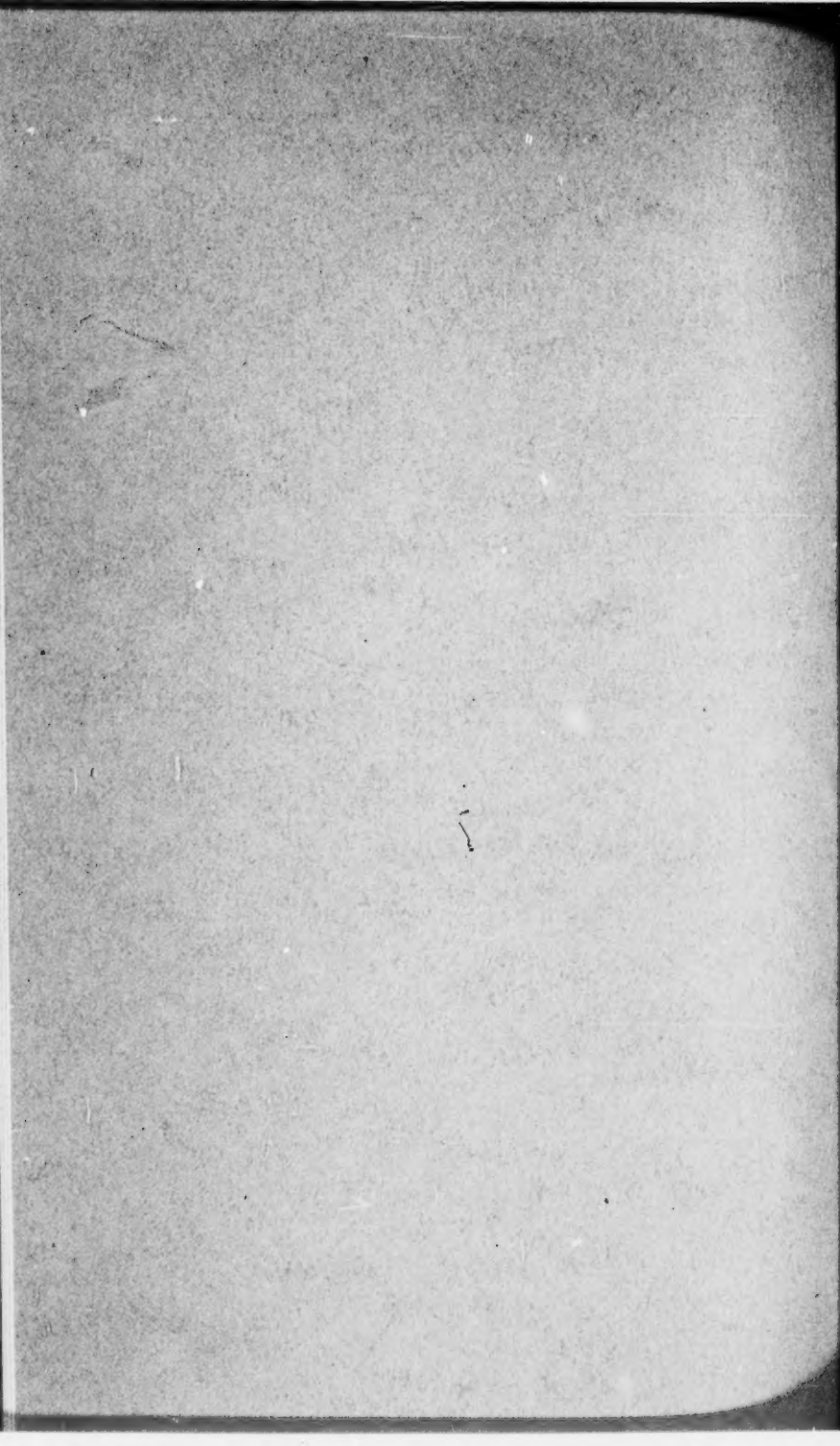
*City Attorney of the City of Los Angeles, Cali-
fornia,*

Attorneys for Defendants in Error.

J. A. ANDERSON and

W. H. ANDERSON,

Of Counsel.



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IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM 1914.

No. 368.

Banning Company, a corporation,
Mary H. Banning, Lucy T.
Greenleaf, Mary H. Norris, Han-
cock Banning and Pacific Elec-
tric Railway Company, a cor-
poration,

Plaintiffs in Error,

vs.

People of the State of California,
upon information of U. S. Webb,
Attorney General,

Defendants in Error.

REPLY BRIEF OF DEFENDANTS IN ERROR.

This action is one of a series of actions brought by the state of California against various claimants under state tide-land patents covering the entire bay of Wilmington or the inner harbor of San Pedro, except portions of the old channel leading up to the town of Wil-

mington, and also covering the tide-lands on the west side of the San Pedro channel and a considerable area on the east side of the San Pedro channel.

The San Pedro channel is a channel connecting the bay of Wilmington with the Pacific ocean, referred to in the main opinion in L. A. No. 3060, in the Supreme Court of the state of California, entitled "People v. California Fish Company," page 168 of the transcript of record in this case. The cases were tried and decided at the same time, and the opinions in the various cases are incorporated in the transcript of record.

The particular tract embraced in this action is known as Tide-Land Location No. 57, and comprises 470 acres of land, being the upper portion of Wilmington bay, and covers the entire water-front of the old town of Wilmington as it was originally incorporated. It extends to the main Wilmington channel near the foot of Canal street, and has that channel for its southern boundary for about one-half mile, and at places near the eastern end it cuts across and covers part of the channel. In the western portion of Wilmington bay, now known as the West Basin, it covers a large area, a great part of which has always been below the line of low tide. The exact location of this tract of land with reference to the town of Wilmington and

the harbor of San Pedro or bay of Wilmington is shown on an exhibit attached to this brief, being a copy of plaintiff's diagram "A" used in the court below. The lines of low tide and the location of the old channel, however, are not shown upon this map.

The defendants (plaintiffs in error) claim under a state tide-land patent procured by Phineas Banning. The Banning Company and the individual plaintiffs claim the fee, while the Pacific Electric Railway Company claims a right-of-way for railway purposes, and the Los Angeles Harbor Company and the Imperial Investment Company claim under leases from certain of the defendants, and also under a fifty-year lease from the city of Wilmington. The land is unimproved except for the electric railway built in 1905, and certain piles driven by the Los Angeles Harbor Company in 1908, and a line of the Southern Pacific Railroad Company the last of which is not attacked.

HISTORY OF THE CASE.

Long prior to the time of American occupation of this western coast, San Pedro was the seaport of Los Angeles and the surrounding country. There ships came to take on hides and tallow, which were the principal products, and the loading and unloading were effected down near what is known as Tims Point or Sepulveda

landing. The port is described by Richard Henry Dana in his "Two Years Before the Mast."

During the '50's there was founded a town on the northern shore of the bay first known as New San Pedro. Later in 1863 the name was changed to Wilmington by act of the legislature of California.

Before 1859 Mr. Phineas Banning constructed a wharf at the foot of Canal street extending into the main channel in Wilmington, and during that year he built shipways several hundred feet east of the wharf, which were used for a few years for repairing and cleaning lighters and other flat craft employed in bringing ships' cargoes from the roadstead in the outer bay through the channel to the wharf.

Sometime in the early sixties, just when does not appear, the Southern Pacific Railroad Company also constructed a wharf along the channel west of the Banning wharf.

About 1860 the government established an army post at Wilmington at which were kept a large number of soldiers, and there was built, in 1864, a government warehouse near the waterfront, which still stands.

In 1866 Mr. Banning filed with the county surveyor application for survey of a large tract of tide and submerged lands, embracing the 470 acres later included in the patent, and also addi-

tional area, the exact amount not being shown, being the fractional north half of section 8 lying south of the portion embraced in the patent [Tr. fol. 197], and probably covering still further portions of the channel. The survey was made and filed with the state surveyor-general in 1866. Nothing was done with this application for eleven years, when in 1877 Phineas Banning caused a new survey to be made to correct errors in the original survey [Tr. fol. 193], and filed an amended application, together with a demand for approval of the survey by the surveyor-general. This new survey and amended application omitted the fractional one-half of section 8, which was included in the original survey and application. [Tr. fol. 197.]

Prior to the filing of the amended application, and about 1874, another wharf was built west of the railroad wharf by other parties at the foot of the land afterwards sold to James McFadden, and McFadden in 1877 applied for a tract of tide-lands conflicting with the Banning application. The Southern Pacific Railroad Company also in 1877 filed a right-of-way map over parts of the land, though their railway and wharf had been constructed prior thereto.

A contest arose between the three claimants. This was referred to the District Court for adjudication in pursuance of sections 3414 and 3415 of the Political Code of the state, and a

decree was entered in December, 1879, defining the rights of the respective claimants as against each other.

By this decree the court determined that Banning upon further compliance with the law was entitled to purchase the land described in the amended application and survey, excepting a portion thereof covered by the McFadden patent, which it was determined McFadden had the right to purchase, and subject also to the railroad right-of-way and wharf. This right-of-way extended from the foot of Canal street southwesterly to the McFadden property. The location of the McFadden parcel is shown upon Exhibit "A" hereto attached.

Apparently the court held that Banning's original application gave him no preferred rights as against the subsequent application of McFadden, as his amended application was subject to the rights of McFadden as to the excepted parcel.

Under section 939, C. C. P., an appeal from the judgment could have been taken within twelve months after its entry, and it was not conclusive as evidence until the expiration of that time, unless the right of appeal had been waived. However, on February 25th, 1880, the Banning application was approved by the surveyor-general, and on March 5th, 1880, Banning made his first payment of 20%, and the patent sub-

sequently issued on December 16th, 1881, upon full payment of \$1.00 per acre being made.

The act under which the application of Phineas Banning was made was passed by the California legislature in 1863. (Sts. 1863, p. 591.) This was a general act providing for the sale of all of the public lands of the state, and setting forth the procedure for the purchase of state school lands and other lands granted in aid of schools by the United States, swamp and overflowed lands of the state, and salt marsh and tide-lands. This law excluded the latter classes of lands from its operation within a certain distance of certain designated places—San Francisco, Oakland and San Quentin.

In 1868 a new general law, a re-enactment of existing laws, providing for the sale of public lands of the state, was adopted in California, with a similar reservation to that in the Act of 1863, but in 1870 section 70 of the act of 1868 was amended (Sts. 1870, p. 875) by providing that swamp, overflowed, salt marsh and tide-lands within two miles of any town or village were excluded from sale. The amending Act of 1870 further provided that all acts, and parts of acts, in conflict with such amendment, were repealed.

In 1872 the Political Code of California was adopted, and that code contained a complete scheme for the sale of the public lands of the

state, and by sections 3440 to 3488 provided for the sale of swamp, overflowed, salt marsh and tide-lands, but by the terms of the latter section all such lands within a certain distance of San Francisco and Oakland were excepted, and also all such lands within two miles of any incorporated city or town were excluded.

In 1872 the town of Wilmington was incorporated by an act of the legislature of the state of California. No organization followed, but in the series of cases of which this is one it was determined by the Supreme Court of California that Wilmington did become an incorporated city by the act of incorporation, and it continued as such until 1887, when an act repealing the act incorporating Wilmington was passed by the legislature.

In 1879 the new Constitution of the state of California was adopted, and section 3, article XV of that constitution provides as follows:

“All tide-lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay or inlet, used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations.”

This Constitution went into effect on January 1st, 1880, over two months before the first payment was made by Phineas Banning under his

application, and before any approval by the surveyor-general of the application.

The Supreme Court of the state held in this case that no rights were vested in Banning by the proceedings prior to payment, and that the effect of the Act of 1870 and of the Political Code, section 3488, and of article XV, section 3, of the Constitution, was to withdraw the land covered by the Banning application from sale because within two miles of Wilmington. [Tr. fols. 374-392.]

All of the justices concurred in the decision on this point. (See concurring opinion of Judge Beatty, p. 193, and separate opinion of Judge Henshaw, p. 196.) The point of disagreement between the justices related to the effect of a patent to land which was not reserved.

The position of the state (defendant in error), which was sustained by our Supreme Court, is that no contract was created by the filing of the application of Phineas Banning, or by any of the subsequent steps. That no right could become vested under any of the laws of California relating to the sale of its public lands until payment of a portion of the purchase price had been received by the state; that until such time the applicant had the mere privilege of purchasing if the law continued in force, but that the lands were subject to be reserved from sale

by the state, and were so reserved, before any payment was made by Mr. Banning.

It is contended by us that this reservation took place first in 1870, about four years after the filing of the original application, when by amendment to the Act of 1868 tide-lands within two miles of any town or village were excluded from sale under the laws authorizing the sale of public lands of the state, because the town of Wilmington at that time existed and the lands were within two miles thereof.

We contend further that by the adoption of the code in 1872 the lands were again reserved from sale as Wilmington at the same session of the legislature, to-wit: 1872, was incorporated as a town by special act of the legislature; and, finally, we contend that the Constitution itself, which went into effect on January 1st, 1880, reserved these lands from sale, they being of the precise character referred to in section 3, article XV, of the Constitution, *supra*, and that all of these laws were passed, and the Constitution adopted, before any vested right accrued; that is to say, before any payment was made by Phineas Banning.

THE ACT OF 1863.

This act, as stated, was a general law providing for the sale and management of all of the lands belonging to the state, including the

school lands (sixteenth and thirty-second sections), and those granted to the state by special act, and also the swamp and overflowed, salt marsh and tide-lands of the state.

By section 11 a state land office was created, and the surveyor-general was made *ex-officio* register by section 12. By section 13 it was made his duty to keep separate and distinct records of all classes of lands, and plots of all approved locations and surveys.

Section 1 provided that swamp, overflowed, salt marsh and tide-lands should be sold at the rate of \$1.00 per acre, payable 20% within thirty days of the record of the approval of the survey or location by the surveyor-general, and the balance when called for by any act requiring such payment, or before, if desired by the purchaser.

Section 2 provided that the unsold portion of the school lands should be sold at the rate of \$1.25 per acre, payable 20% within fifty days from the date of the record of approval of survey or location in the state locating agent's office, and the balance within one year after the passage of any act requiring such payment.

Section 3 provided that any resident of the state who was desirous of purchasing any of the swamp, overflowed or tide-lands should file an affidavit setting forth his qualifications and an application to purchase with the county sur-

veyor of the county in which such lands were situated.

Section 4 contained a similar provision for residents of the state desiring to purchase any of the unsurveyed sixteenth and thirty-second school sections, or lands in lieu thereof, the application for a survey and plot and field notes was required to be filed with the county surveyor, which survey, when obtained, the applicant was required to file with the locating agent of the district in which the lands were situated.

Section 6 related to applications to purchase surveyed school lands, which applications were required to be filed with the state locating agent of the district direct.

Section 7 required the county surveyor upon receiving an application for a survey called for by sections 3 and 4 of the act to complete such survey within thirty days, and if the lands were swamp, overflowed or tide-lands, to forward such survey to the surveyor-general, and if the lands were part of the sixteenth and thirty-second section grant, to furnish the applicant with a full description by legal subdivision of the lands applied for, which, together with the application and affidavits required by section 4, should be filed with the locating agent of the district.

Section 8 prescribed the duty of the several state locating agents, and they were required

to locate the lands and issue a certificate of location, which in turn was required to be filed with the surveyor-general.

Section 9 made it the duty of the surveyor-general upon the receipt of any application to purchase any of said lands to carefully compare the same with the maps and records of surveys and locations in his office, and if the law had been complied with, and no counter application or conflict existed, at the expiration of thirty days to approve the same, and to forward a copy, with his approval, to the county surveyor, or the state locating agents, as the case might be.

Section 14 provided that whenever any location or survey should have been approved, the purchaser should make payment to the county treasurer.

Section 17 provided that the certificate of purchase issued by the register should be deemed *prima facie* evidence of title to the land and was subject to sale and transfer.

Section 18 provided for any purchaser of state land upon a credit abandoning the location or entry, if he elected so to do.

Section 20 provided for the annulment of certificates of purchase where payments were not made.

Section 27 provided for contests arising over the approval of a survey or location before the surveyor-general.

Sections 28 and 29 required an oath of allegiance to be taken and filed and a certified copy to be filed with the surveyor-general before the issuance of any certificate of purchase, and provided that "no right" should attach to "the land" until the moment of filing such oath.

There is appended to the brief of plaintiffs in error (pp. 1 to 12 appendix) the greater part of the Act of 1863, but they omitted the sections authorizing the sale of public lands other than those of the character here involved. These omitted sections are material as they show that the provisions of the law as to all classes of public lands were practically the same. These provisions were re-enacted substantially in the Act of 1868, and all of our earlier decisions hereinafter cited related to school lands sold under that act. For that reason we have in our appendix printed the sections of the Act of 1863 authorizing the sale of the several classes of lands, and prescribing the preliminary procedure up to payment for purposes of comparison. (See appendix, pp. 1...14.....)

It will be noted that this act treats the different classes of lands alike. All unsurveyed lands of every class are required to be surveyed by the county surveyor. For the purpose of locating school lands, certain agents, designated as locating agents, are provided for. The survey by the county surveyor of tide-lands is returned

direct to the surveyor-general, and the survey of school lands is returned first to the locating officer, who issues a certificate of location, and then to the surveyor-general. The latter cannot make any approval before the expiration of thirty days, and after that if there is no conflict with former surveys or locations, and the law has been complied with, the surveyor-general is required to approve the certificate or survey. These are then returned to the county surveyor or the locating agent, as the case may be, and payment is required to be made by the purchaser to the county treasurer.

Questions as to the effect of the provisions of the Act of 1863, or as to the character or interest acquired by a purchaser, arose in one case only (*Hinckley v. Fowler*, 43 Cal. 56), but there are many cases decided under the Act of 1868 (Stats. 1867-8, p. 507), which was a general law providing for the management and sale of the lands of the state and the re-enactment of those then existing, including the Act of 1863, and also embraced certain laws providing for the organization of reclamation districts for the reclamation of swamp, overflowed, salt marsh and tide-lands.

In 1868 (Stats. 1867-8, 507) the state of California passed the law just referred to, "An act to provide for the sale and management of the lands of the state," which, as stated in the

case of *Kimball v. MacPherson*, 46 Cal. 104, was passed for the purpose of reducing into one harmonious system all previous provisions for the sale of overflowed, swamp and tide-lands, and other land belonging to the state, and to provide for the reclamation of the first named classes.

The provisions of this Act of 1868 with relation to the sale of swamp, overflowed, salt marsh and tide-lands and of the other lands of the state are a re-enactment of the provisions of the Act of 1863, except that the sections are differently arranged, and, in some respects, the law of 1868 is more complete; but it is, as counsel for plaintiffs in error state, "in the nature of a modification of several prior statutes relating to lands of the state, including the Act of 1863, and its provisions for the sale of tide-lands are substantially identical with the last mentioned act" (l. 66); and, we will add, its provisions for the sale of school lands are practically the same. The reservation clause in this statute, section 70, was the same as the reservation clause in the Act of 1863. By section 71 all of the state laws with relation to the sale of lands were repealed by special reference to each law, and the said section contained the following clause:

"Provided, however, that the provisions of this act shall not in any manner affect

any legal or equitable claims, now existing on any of the lands hereinbefore described, in favor of any claimant under the state, nor affect any suit or proceeding which is now pending respecting the same, arising out of any claims now made; but the courts of the state may proceed and adjudicate upon said rights, and patents or other evidences of title may issue for the same to the parties entitled thereto, under any existing laws of this state, the provisions of this act to the contrary notwithstanding."

Under the Act of 1868 the oath of allegiance required by the Act of 1863 was not required.

In 1872 the Political Code was adopted. This code re-enacted, with slight changes in verbiage, the Statute of 1868 authorizing the sale of the lands of the state, the provisions with reference to swamp, overflowed, salt marsh and tide-lands being practically identical with those of the former act; and the same is true as to the provisions relating to the sale of school lands with some minor changes. There was a change made, however, as to the reservation of swamp, overflowed, salt marsh and tide-lands from the Act of 1868 as amended in 1870; by section 3488 such of those lands were excluded from sale under the Political Code as were situate within two miles of any incorporated city or town.

Thus we see that during all of the time since 1863 the swamp, overflowed, salt marsh and

tide-lands have been authorized to be sold at \$1.00 per acre, 20% being required to be paid in cash after approval of the survey by the surveyor-general.

In all of the enactments the application for survey and affidavit were required to be filed with the county surveyor who made the survey of the land applied for, and who filed such survey, with the application and affidavit, with the surveyor-general. The approval of the surveyor-general was required in all cases.

Under each of the enactments the purchaser was required to present his certificate of approval to the county treasurer within fifty days after approval, and the county treasurer was authorized to receive payment in whole or in part for the land.

In all of the enactments provision was made that upon payment a certificate of purchase should issue, and all of them had provisions for the annulling of a certificate of purchase in case any future payments were not made, the only difference being that the Statute of 1863 provided that the certificate should be annulled "as provided by law," whereas under the later statute the procedure for such annulment was prescribed.

By each and all of the statutes provision was made for the referring of any contest which arose between two or more applicants for the

purchase of the same tract of land to the District or Superior Court in order that the court should determine the conflict.

In all of these statutes practically the same provisions existed with reference to school lands; and in the earlier statutes, adopted before the United States surveys had been completed over the entire state, provision was made for the survey by the county surveyor of all unsurveyed public lands upon application being filed.

CONTENTION OF DEFENDANTS IN ERROR.

The defendants in error maintain that a sound construction of the California statutes leads to the conclusion that it was not intended by those laws that the state should part with any title in its public lands until all of the steps required of the applicant to purchase had been completed, including payment of part of the purchase price—that until then the state could reserve the land from sale; and the applicant had merely a privilege of completing his purchase if the law remained in force, superior to any rights acquired by later applicants, but was under no obligation to complete it.

The defendants in error further maintain that the decision and opinion of the Supreme Court of the state of California in this case should be affirmed, for the reason that by an unbroken line of decision, beginning in 1870 and extend-

ing to the present date without any conflict, it has become the thoroughly established law of the state of California that applicants to purchase state lands of any character or description acquire no vested right until payment of part of the purchase price; that such rule of decision has become a law of property with reference to school lands by express adjudication since 1870 and by express adjudication since 1897 as to tide-lands.

We further contend that an unbroken line of decisions of this court has established the doctrine that an applicant to purchase lands of the United States either under the pre-emption laws or under townsite laws or under special laws authorizing the sale of land, acquires no rights as against the government until all of the preliminary steps required by law are complied with, and, where payment is required, until such payment, in whole or in part, has been made; that such laws of the United States are so similar to the laws of the state of California with reference to the sale of its public lands that the decisions of this court with reference to the former are direct authority here; and that this court should follow that line of decision in deciding this case.

It is also urged by defendant in error that while it is true that this court will exercise its independent judgment in construing state laws

where it is claimed that some contract has arisen under such laws or some vested rights have accrued thereunder which have been subsequently impaired or affected by legislation of the state, yet in all cases that are balanced with doubt as to the proper construction of such laws, or as to whether a contract or right has been created under such laws, this court will follow the decisions of the Supreme Court of the state construing or interpreting or defining such laws, and that if this well established rule is applied here, the affirmance of the judgment of the Supreme Court of the state of California should follow.

Defendants in error also contend that the rule which has been established by this court, and by the Supreme Court of the state of California, that a sovereign state in dealing with its public lands, and in providing for their sale, impliedly reserves the right to withdraw any portion of such lands from sale that it deems fit at any time before payment has been made, applies with peculiar force to lands of the character involved in this action which constitute the water front of a seaport town on a navigable bay used for commerce, and which, by the Constitution of the state of California, are expressly reserved from any kind of disposition whatever, except to municipal corporations, and by such reservation are devoted exclusively and entirely to a public

use; and, further, that, even though some right may have vested in Banning by the proceedings, yet under the doctrine of the Chicago case, 146 U. S. 387, 36 L. E. 1018-1045, the same could be revoked, and, under the circumstances presented here, no consideration having been paid before the Constitution went into effect, no compensation would have had to have been made by the state.

We urge further that if there is doubt as to the proper construction of the law, then the rule that, in such cases, interpretation most favorable to the state must prevail, necessitates a decision in favor of the state.

CALIFORNIA CASES.

In the case of *People v. Shearer*, 30 Cal. 65, there arose the question of the rights of claimants under the Act of 1863, which was passed by congress, authorizing purchasers under the Vallejo Grant in the state of California, which had been held invalid, to enter lands embraced in such grant (the grant being known as the "Suscol rancho"), such entry being required to be made within one year after the lands were surveyed.

The point involved was whether or not such claimants before payment, but after they had entered upon the land, had acquired any proprietary interest as against the United States

which was subject to taxation by the state. The court held that no proprietary interest or vested right as against the United States would accrue until payment, and said:

"There is no obligation on the part of the occupants, notwithstanding they have proved up their claim, to take the land. They may abandon it tomorrow, and refuse forever to pay the price. There is no obligation to take it, and the government has no claim or demand, covenant or promise, which it can enforce against the occupants, who now have the right to purchase under the act. Yet the occupants are dealing with the government in the character of a proprietor of land offering to sell upon the terms of payment alone. There is simply an offer made on one side, with a manifestation on the other side of a desire and intention to accept it at some future time; but as yet no actual acceptance or performance of the conditions necessary to constitute an acceptance. There is an offer to sell unrevoked, and a present right to accept, but no proprietary interest vested in the land. Congress could at any time repeal the act, and thereby revoke the offer; and this is liable at any time to be done, if the settlers do not within a reasonable time perfect their inchoate rights by paying the purchase money.

"The Supreme Court of Mississippi says upon this point: 'The most important provision of the law still remained to be complied with—the land was to be paid for. The determination of the commissioners settled nothing, but that Matlock's representatives had a right to buy a particular tract of land if they wished to do so. A mere

right of pre-emption is not a title. It is only a proffer to a certain class of persons that they may become purchasers if they will. Without payment, or an offer to pay, it confers no equity. It is only regarded as conferring an equity when the party has consented to accept the offer by payment, or by claiming the benefit of the law in the proper manner, within the required time.' (Grand Gulf R. & B. Co. v. Bryan, 8 Sm. & M. 268. See also Phelps v. Kellogg, 15 Ill. 135; Bower v. Higbee, 9 Mo. 261.)

"In the cases of *Hastings v. McGoogin*, 27 Cal. 85, and *Page v. Hobbs*, Id. 483, we held that the Act of Congress of March 3rd, 1863, authorizing certain purchasers under Vallejo to enter the lands embraced in the Suscol rancho, within one year after the filing of the surveys and plats, withdrew said lands from the operation of the general pre-emption laws, and conferred the rights to purchase upon a particular class of persons other than those who had already entered and set up claims under the general laws, thereby necessarily assuming that it was competent for Congress to thus withdraw them. The question was, in fact, made in those cases, that Congress had no power to withdraw from the operation of the general pre-emption laws those lands as to which parties had taken the preliminary steps in pursuance of the provisions of such general law to acquire a pre-emption right. But the court were clearly of the opinion that no property right had yet vested—that there was no contract existing between the claimant and the government, and that it was competent for Congress to repeal the law granting pre-emption rights, or to withdraw any particular lands from the opera-

tion of its provisions, and no time was spent in discussing the question. To hold otherwise, would be to hold that there might be a contract without consideration, and without being mutually obligatory on the parties."

The case in 27 Cal. 85 referred to was decided in 1864.

The case of *People v. Shearer* was cited by this court in the case of *Frisbie v. Whitney*, 9 Wall. 187.

Again in *Hutton v. Frisbie*, 37 Cal. 475, the California court re-affirmed this doctrine in the case of a pre-emptor who had prior to 1863 settled upon portions of the Suscol rancho, such portions being at that time unsurveyed lands of the United States, with the intention of purchasing the same, and held that the Act of 1863 reserved the land for the claimants under the Vallejo grant, which had been held invalid, and that no vested right had been acquired by the pre-emptor.

This case also is referred to as authority by this court in *Frisbie v. Whitney*, *supra*.

STATE SCHOOL LANDS.

In the case of *Eckart v. Campbell*, 39 Cal. 256, there arose the question of the nature of the rights obtained by an applicant for the purchase of school lands under Act of March 28th, 1868, providing for the management and sale of lands

belonging to the state, which act, as already stated, in so far as the provisions relating to the sale of land and the procedure therefor are concerned, is practically the same as that of 1863. The applicant in that case had received a certificate of location of a parcel of state school lands as provided for under the Act of 1868, which had been approved by the surveyor-general. The applicant failed to pay the first payment within fifty days, and the land was sold to another. The first applicant claimed that a vested right had accrued to him, and that the land was not subject to sale until his rights had been foreclosed in some way. The court, however, held that no contract had been entered into, and that no vested right had accrued to him. On pages 259-260 the court said:

“In our opinion it was the intention of the act, that the certificate mentioned in section 12 should, in its own language, ‘authorize the county treasurer of the county in which the lands are situated, to receive payment thereon.’ It was intended to give to the person, who obtained it, the exclusive privilege to become the purchaser of the particular premises described, at any time within the fifty days from its date. It is, however, a mere privilege which he might, at his option, accept or decline within that time—and his failure to pay the twenty per cent, as required, is conclusive evidence to the land officers that he has abandoned the privilege thus conferred upon him. It is true that the holder of this certificate is in

some sections of the act styled the 'purchaser,' and this, too, in advance of his making the first payment of twenty per cent. Loose or inapt expressions of this character, however, ought not to defeat what we think is the otherwise clear intent of the statute. It is distinctly provided in section 4 that 'whenever the register shall receive from the county treasurer of the proper county a statement, showing that any applicant for any state lands has made the first payment of principal and interest, as hereinafter provided, he shall issue to the person or persons entitled thereto a certificate of purchase, which shall show the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest shall be computed, the amount paid, and the amount remaining unpaid—which certificate shall be received in any court of justice in the state as *prima facie* evidence of title.'

"The holder of such a certificate as that held by Eckart is, in this section, distinctly characterized as an *applicant* merely, and it is the payment of the twenty per cent which converts him into a *purchaser*, and entitles him to receive from the register a certificate, which sets forth the terms of the contract, now for the first time made between the applicant and the state, the description of the land purchased, the sum already paid, and the amount to be paid hereafter, etc.

"And in cases where proceedings are instituted, by the state, for the purpose of foreclosing the interest of the purchaser, for non-payment of the balance of the purchase money, it is provided that if property of the defendant in such action sufficient in amount

to pay the costs, etc., be not found, it 'shall be paid from the twenty per cent of the principal of the purchase money, or from the interest paid by the purchaser at the time of the original location and entry of the land.' It does not seem to have been the intention of the statute, that the state should be considered as having parted with any interest in the land, until she had received the payment of at least the first installment of the purchase money."

This case was decided in 1870.

In *Johnson v. Squires*, 55 Cal. 103, the question again arose in the following manner: An applicant, who was not a settler upon the land, filed his application in the due and proper form, and of course paid the necessary filing fees, to purchase a parcel of school land before the Constitution of 1879 was adopted. That Constitution went into effect in 1880, and provided, among other things, that lands which were suitable for cultivation should only be sold to actual settlers. The court held that if the land was suitable for cultivation, and the applicant was not an actual settler, that he was not entitled to purchase the land, notwithstanding the fact that his application and entry had been made under the law as it existed at the time the Constitution went into effect, and such law at that time did not require the applicant to be a settler upon the land. The court held as follows:

“The application of plaintiff, we may assume, complied in form and substance with the law in existence when it was made. Yet we cannot determine that he is entitled to purchase, in view of the prohibitory provision of the Constitution: ‘Lands belonging to the state, which are suitable for cultivation, shall be granted *only to actual settlers.*’

“This language is clear and explicit, and operates as well on applications made before as after the Constitution took effect. As the case shows, appellant has paid no portion of the purchase-money nor has his proposition to buy been accepted by the agent of the state. He has parted with nothing of value, and can neither assert that the state Constitution has ‘impaired the obligation’ of a *contract*, or deprived him of property ‘without due process of law.’ ”

It will be observed in this case that the case itself was pending at the time that the Constitution went into effect, and the court took judicial notice of the change in the law.

This doctrine was re-affirmed in the case of *Urton v. Wilson*, 65 Cal. 11, and the court in that case said:

“For the purposes of the controversy between the plaintiff and defendant, it is necessary only to say that plaintiff has no right to purchase the land. Section 3, article XVII, of the Constitution of this state declares: ‘Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quan-

ties not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law.' The plaintiff was not an actual settler. It is true, he made his application before the Constitution was adopted, but he thereby acquired no rights which the state could not annul; he had paid nothing. This question was directly considered and passed on in *Johnson v. Squires*, 55 Cal. 103. So long as the statute remained in force, the plaintiff's application might have been entitled to consideration, if defendant's application was void; but when the statute was modified by the Constitution, he was obliged to bring himself within the constitutional provision. We note, as referring, in principle, to the plaintiff's case what is said by the court (by Sawyer, C. J.) in *Hutton v. Frisbie*, 37 Cal. on pp. 490-498, regarding pre-emption laws and the effect of their repeal."

Mosley v. Torrence, 71 Cal. 318-321, and *Manley v. Cunningham*, 72 Cal. 236, were each cases arising under the Political Code for the sale of school lands, and in each case it was held that no vested right accrued prior to payment.

In the case of *Mosley v. Torrence* this was held in spite of the fact that the defendant, who had applied to purchase the land prior to the adoption of the Constitution, had improved the land, had it fenced, and had also expended practically \$3,000.00 in improvements before the second application was made in 1882, and during all

the time was in occupation through his employees. Notwithstanding this, however, the court held that inasmuch as he was not an actual settler he was not entitled to purchase the land, and the fact of his having made the application and having enclosed the land gave him no vested rights prior to the adoption of the Constitution.

In 1897 the question first arose in the Supreme Court of California with reference to tide-lands in *Klauber v. Higgins*, 117 Cal. 451. This action involved a sale under the Act of 1868, the application having been made in 1869 when the lands were not reserved, but subsequently in 1870 by the amendment to the Act of 1868 all lands within two miles of any town or village were excluded from the operation of the act. The lands were within the town or city of San Diego. The court held that no vested right had accrued, and said:

“If, therefore, the land in contest in the case at bar was reserved from sale by the said act of the legislature under which appellants claim, the officers of the government had no right to sell the same, and any attempt on their part to do so was void. And we think that said land was clearly so reserved. The applications under which appellants claim were not approved until November, 1871, and no payments were made by the applicants prior to that time. They, therefore, had made no contract with the state, and had no vested rights until that time. But before that time, to-wit: on

April 4, 1870, the legislature amended section 70 of said act so as to read as follows:

“‘All the swamp and overflowed, salt marsh and tide-lands within one mile of the state prison at San Quentin, within five miles of the city and county of San Francisco, within five miles of the corporate limits of the city of Oakland, and within *two miles* of any town or village, are hereby excluded from the provisions of this act.’”

This doctrine was re-affirmed in the case of *Messenger v. Kingsbury*, 158 Cal. 615, where the court said:

“Plaintiff herein had, at the time of instituting this proceeding, advanced to the point of offering for filing his affidavit and application to purchase, and no further. He has not, to the present time, gone beyond this point. His survey has not been approved, and he has not paid the first installment of twenty per cent, or any part of the purchase price. While matters were in this condition, the legislature by an act approved and effective March 25th, 1909 (Stats. 1909, p. 774), enacted section 3443a of the Political Code reading as follows: ‘The words “tide-lands” mentioned and described in sections thirty-four hundred and forty and thirty-four hundred and forty-three of this code shall not be held or construed to apply to or to include the share, or any part thereof, or the bed, or any part thereof, of the ocean, or of any navigable channel or stream or bay or inlet within the state, between ordinary high and low water mark, and all such land over which the ordinary tide ebbs and flows is hereby withheld from

sale. Nothing in this section shall be construed as a recognition that prior to the passage hereof, the tide-lands by this section withheld from sale have been offered for sale by the state.'

"Now, whatever may have been the effect of sections 3440 and 3443, standing alone with respect to the purchase of tide-lands forming the shore or bed of navigable waters, there can be no question that by the enactment of section 3443a further sales of such lands were forbidden. If lands of this character had theretofore been offered for sale, the legislature, in passing the new section, manifested, by language too plain to be misunderstood, its intent to withdraw them from further sale under sections 3440 and 3443. The disposition of the public lands is a matter resting entirely within the control of the legislature and that body has the undoubted right to withdraw or reserve from further sale any part of the public domain. (36 Am. & Eng. Ency. of Law, 2nd ed., 225; *Day Land etc. Co. v. State*, 68 Tex. 526 (4 S. W. 865.)) Where a valid contract of sale has been entered into pursuant to law between the state and a purchaser so that an equitable interest in the land is vested in the latter, the state will, of course, be prevented by force of familiar constitutional provisions from destroying the right so vested. (*Pennoyer v. McConnaughy*, 140 U. S. 1 (11 Sup. Ct. 699).) But where there is no contract, and no vested right in the intending purchaser, the withdrawal of the land from sale, by repeal of the statute authorizing sales or otherwise, absolutely terminates the power of the officers of the government to take the steps necessary to transfer title. (*Frisbie v. Whitney*, 9 Wall. 187.)

"The decisions of this court are clear to the effect that an applicant who has merely filed his affidavit and application to purchase, without paying any part of the purchase price, under statutes essentially similar to the scheme provided by the Political Code for the disposition of public lands, has no such vested right as will prevent a termination of the opportunity to purchase upon a repeal of the law providing for sale."

And again in *Polk v. Sleeper*, 158 Cal. 632, the court said:

"The effect of our statutes is that the right of one who has merely filed an application to purchase state land and whose application has never been approved and who has received no certificate of purchase or paid any part of the purchase price, is purely a personal right which does not survive him. The authorities in this state are clear upon the proposition that an applicant so situated has no such vested right as will prevent a termination by the state of the opportunity to purchase by a repeal of the law providing for a sale of the land. These authorities are fully discussed and the same conclusion reached in the case of *Messenger v. Kingsbury*, S. F. No. 5252, *ante*, p. 611 (112 Pac. 65). We think it is clear that an applicant so situated has nothing more than a purely personal right to himself proceed with the purchase so long as the state does not change its laws relating to the sale of the land."

In the case last cited, it was held that the right to proceed with the purchase did not de-

scend to his heirs upon the death of the applicant.

The doctrine of these cases was recently reaffirmed in the case of *Ayers v. Kingsbury*, 143 Pac. 83, by the California District Court of Appeal.

Thus we see that as early as 1864 the Supreme Court of California established the principle that the federal government could reserve its lands after settlement by a pre-emptioner, and in 1866 held that until payment of part of the purchase price, an applicant to purchase public lands acquired no right as against the government to complete his purchase, and that the lands before payment might be withdrawn from sale, and the claimant or applicant deprived of the right to purchase. This early case, it is true, involved a pre-emption under the federal laws, but the principle underlying the decision was the same as that in subsequent cases, that the law conferred a privilege or option upon the applicant to purchase the lands which might or might not be exercised by him; that there was no obligation on the part of the applicant to complete the purchase, and no obligation on the part of the government or the state to complete the sale, and that no contract existed or arose until payment had been made.

The same principle has been announced, and the same conclusion reached, upon the same rea-

soning in the school land cases, and when the question first arose in a state tide-land case the Supreme Court of the state announced and applied the same doctrine.

By these decisions a rule of property has been established in this state with reference to public lands which under every principle governing similar cases should not be disturbed. The rights of hundreds of persons, the title of vast areas of lands which have been predicated upon the laws of this state as they have been declared by our courts, would be jeopardized, and the law would be revolutionized, if the contrary doctrine should be now established.

THIS COURT'S CASES.

The question we are considering first came before this court in suits arising under the Act of February 17, 1815, for the relief of sufferers from the New Madrid earthquake. This act provided in effect that those persons whose lands had been materially injured by the New Madrid earthquake should be authorized to locate the same quantity of land on any of the public lands in the Missouri territory authorized to be sold, upon which being done the title to the land injured should revert to the United States. An official known as a ^{recorder} ~~receiver~~ was provided for, to carry the act into effect, and a survey was

required to be made and approved by the receiver. *Corden*.

In the case of *Bagnell v. Broderick*, 13 Peters 436, 10 L. E. 235, a person whose land had been injured by the earthquake within the territory applied to the appropriate officer and obtained a certificate that he was entitled to locate a tract of land within the territory under the act. An application was made by him for a survey of a parcel of land as required by the act. Before the survey was returned to the office of the recorder and approved by him, the particular parcel which he had selected, together with other lands, was withdrawn from sale by Act of Congress. The court held that, under the New Madrid Act, the lands sought to be located were not appropriated until the survey required by the act was actually returned and recorded.

In *Rector v. Ashley*, 73 U. S. 132, 18 L. E. 733-735, this court said:

"We are much *pressed* in the present case with the argument that the title here spoken of by the court, is the legal and not the equitable title; and that, inasmuch as the applicant has done all that he can do to make good his claim to the land, when he has deposited with the surveyor his certificate of loss, with a description of the land desired in exchange, he has thus acquired an equitable interest in the land so described, which the United States cannot divest by giving it to another.

“But the rights of claimant are to be measured by the Act of Congress, and not exclusively by what he may or may not be able to do; and if a sound construction of that act shows that he acquires no vested interest in the land until the officers of the government have surveyed the land, and until that survey is filed in the office of the recorder and approved by him; then as claimant's rights are created by that statute they must be governed by its provisions, whether they be hard or lenient. It seems to us clear, from the foregoing cases, that the court intended to decide that, until this was done, the claimant acquired no vested right to the land; no title, legal or equitable.”

Again, in the Hot Springs case, 92 U. S. 713, 23 L. E. 696, the same doctrine was re-affirmed. In that case the survey of the land applied for had actually been made, and deposited by the deputy United States surveyor in the office of the surveyor-general, but had never been recorded or recognized by him, for the reason that there was some conflicting Indian claim. This, however, was removed in 1818. In 1832 the lands were withdrawn from sale, and it was held that under the facts presented the claimant had acquired no vested right.

In the case of *Frisbie v. Whitney*, 9 Wall. 187, 19 L. E. 671, this court established the principle that a pre-emptioner who had settled upon unsurveyed land and applied to the land office to

make declaratory statement and filed the same, but had made no payment, acquired no rights which would prevent the government from withdrawing the land from sale or making other disposition of the same. This court said:

“The Act of Congress on this subject, to which all the subsequent acts refer, and which prescribes the terms and the manner of securing title in such cases, is the Act of September 4th, 1841. 5 Sts. at l. 453. That was an act full of generosity, for it gave the proceeds of the sales of all the public lands to the states. The 10th section of the act provides that any person of the class therein described who shall make a settlement upon public lands, of a defined character, and who shall erect a dwelling thereon, shall be authorized to enter with the register of the proper land office by legal subdivisions, one-quarter section of said land, to include the residence of the claimant, upon paying the minimum price of such land. Section 11 provides that conflicting claims for pre-emption shall be settled by the register and receiver; section twelve, that prior to such entry, proof of the settlement and improvement required shall be made to the satisfaction of the register and receiver; and section 13 requires an oath to be made by the claimant before entry; section 15 requires a person settling on land with a view to pre-emption to file, within a limited time, a statement of this intention and a description of the land.

“When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and

after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with the legal title to the land.

"The construction of this act, and others passed since *in pari materia*, in regard to the nature of the rights conferred on occupants of the public lands, has, of course, received the consideration of that department of the government to which the administration of these land laws has been confided. The construction of that department and of the attorneys-general to whom the secretaries of the interior have applied for advice, cannot be better expressed than in the language of some of those opinions.

"Attorney-General Cushing, in an opinion given in 1856 (8 Opinions Atts.-Gen. 72), says: 'Persons who go upon the public land with a view to cultivate now, and to purchase hereafter, possess no rights against the United States, except such as the Acts of Congress confer; and these acts do not confer on the pre-emptor, *in posse*, any right or claim to be treated as the present proprietor of the land, in relation to the government.'

"In the matter of the Hot Springs Tract of Arkansas, Attorney-General Bates says (10 Opinions 57): 'A mere entry upon land, with continued occupancy, and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase land in preference to others. * * * His settlement protects him from intrusion or pur-

chase by others, but confers no right against the government.'

"In the matter of the same Soscol ranch (11 Opinions 462), Attorney-General Speed asserts the same principle. He says: 'It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. * * * The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money.'

"These opinions, written for the guidance of the land department, have been received and acquiesced in by the secretaries of the interior, and have come to be the recognized rule of action in that department.

"This construction of the law has also been asserted by the courts of last resort in Missouri, Mississippi, Illinois and California—states in which the population is largely interested in the liberal operation of the pre-emption laws. *Bower v. Higbee*, 9 Missouri 261; *Phelps v. Kellor*, 15 Ills. 135; *Grand Gulf v. Bryan*, 8 Smed. & M. 268; *People v. Shearer*, 30 Cal. 650; and *Hutton v. Frisbie*, in the Supreme Court of California, July term, 1869."

In the famous Yosemite Valley case, 15 Wall. 67, 21 L. E. 82, the doctrine was re-affirmed in an elaborate opinion.

In *Shepley v. Cowan*, 91 U. S. 330, 23 L. E. 424, the doctrine of those cases was distinguished and admirably set forth in the opinion. (P. 339, 27 L. E. 427.)

It is true that these United States cases are not strictly on all-fours with this case owing to differences in the respective laws. However, those laws have many points in common, and there is a close parallel in the reasoning of this court in construing the Federal laws and that of our state court with reference to the state laws.

The law relating to pre-emptions declares that any person who shall make a settlement upon public lands, whether surveyed or unsurveyed, and who shall inhabit and improve the same and erect a dwelling thereon, shall be authorized to enter the land upon paying the minimum price for such land, but in case of unsurveyed land such entry could not be made until after a survey by the United States and after the lands were offered for sale. The California Act of 1863, re-enacted in 1868, authorized any person possessing the necessary qualifications to file an application to purchase state tide lands, and required him to cause the same to be surveyed by the county surveyor, which survey was required to be filed with the surveyor general of the state, and upon approval by the surveyor general, the applicant could purchase the land upon paying one-fifth of the purchase price, and was entitled to receive a certificate of purchase upon such payment.

One of the reasons advanced by Mr. Justice Field in the Yosemite case as supporting the theory that the right of pre-emption given the settler is a mere privilege which he can exercise or not as he elects, but that until he does so elect, and until he evidences his election by payment, there is no contract with the government even though he settles upon the land with the full intention of acquiring the same, and carries out that intention in good faith, is that the lands in question might never be offered for sale by the government, and counsel for plaintiffs in error say in their brief that if a settler upon surveyed land had been held to have no vested right prior to payment, a decision to that effect would be direct authority here in favor of the decision of the lower court in this case.

This court in the case of *Frisbie v. Whitney*, 9 Wall. 187, 19 L. E. 668, cites, with approval, a number of cases from "States in which the population is largely interested in the liberal operation of the pre-emption laws" (to use the language of this court), and among others the cases of *Phelps v. Kellogg*, 15 Ills. 135, and *Grand Gulf v. Bryan*, 8 Smed. and Marshall (Miss.) 268.

The pre-emption right considered in the Illinois case was under the Act of Congress of April 5th, 1832, which provided, among other

things, that "all actual settlers being house-keepers upon the public lands shall have the right of pre-emption to enter within six months," etc.; and it seems apparent from that case that the particular pre-emption claim in question was upon surveyed and sectionized lands of the United States, for it is described and referred to throughout as being a part of a given section in a given township and range.

In the Mississippi case the pre-emption claim involved was under the Act of Congress of March 3rd, 1803, affecting government land south of the state of Tennessee; and the pre-emption offer in that act was to actual settlers, heads of families, or over the age of twenty-one years, who (to quote from the opinion in that case) "did at the time of passing the act inhabit and cultivate a tract of land in the Mississippi territory," etc.,—in other words, the offer to each pre-emptioner was of the specific piece or tract of land which he at the date of the act inhabited and cultivated. Therefore, the actual specific land, merely subject to more definite description by subsequent survey, was, at the date of the act and by the act itself, offered for sale to the person coming within the provisions of the act.

In this latter case the opinion was written by Mr. Chief Justice Sharkey, one of the ablest jurists of this country, and he, in passing upon

the effect of the application for the land and the determination of the applicant's right by the commissioners created by the act, said:

"The determination of the commissioners settled nothing but that Matlock's representatives had a right to buy the particular tract of land if they wished to do so. A mere right of pre-emption is not a title. It is only a proffer to a certain class of persons that they may become purchasers if they will. Without payment, or an offer to pay, it confers no equity. It is only regarded as conferring an equity when the party has consented to accept the offer by payment, or by claiming the benefit of the law in the proper manner, within the required time. The bill proceeds upon the ground, that the first payment for the land was made by, or for the heirs of Matlock; and the whole argument is based on this ground. It is the important point in the cause. Without it the complainant's claim has nothing to rest on." (Op. p. 268.)

In the state courts the right of the applicant is held to be a mere personal privilege, not assignable and not descendable upon death, which he may exercise or not as he elects by making the required payment, and that until he does make the payment there is no contract with the state. In each case there is no obligation whatever on the part of the settler or applicant, as the case may be, to complete the purchase, and there is no obligation

upon the government or the state to complete the sale.

The principle underlying all such cases undoubtedly is that the government when dealing with its public lands is doing so as a governmental agency, and while its contracts with reference to such lands duly entered into are, in most respects, construed the same as those of private persons, yet, as the government is the representative of all the people, and deals with the public domain for the general good of the public, the power is always reserved, until a contract is actually made, to withdraw the lands from sale either by repealing the laws under which they are sold or by making other disposition of the same in the exercise of that discretion which is vested necessarily in the legislative body, where, in the opinion of such body, the public interest will be better subserved, advanced or protected by such withdrawal or disposition. It is a power inherent in a governing body to be exercised for the general public good, and a determination by such body is not reviewable by the courts. Such power is one of the greatest importance in lands such as those involved here which are lands held in public trust for the general public in the interest of navigation and commerce.

The question at the root of all cases similar to this is, has a contract been entered into by

the state, or is it a mere option revocable by either party before its final exercise by the applicant? But in deciding such questions the principle just referred to is of great and often of controlling weight.

Later in this brief there is a more critical comparison of our laws with those of the United States.

THIS COURT WILL FOLLOW THE DECISIONS OF THE STATE SUPREME COURT CONSTRUING A STATUTE UNDER WHICH IT IS CLAIMED A VESTED RIGHT HAS ACCRUED WHERE THE QUESTION IS BALANCED IN DOUBT.

The general rule established by this court is that in construing state statutes the decisions of the highest court of the state will be followed, especially where questions relating to property are concerned. An exception to this rule is that where it is claimed, as here, that a vested right has accrued, or a contract been created, under the state law, the obligation of which has been impaired by some subsequent law, this court is not bound to follow the decisions of the state court construing such laws, but will exercise its own independent judgment as to whether or not a right has accrued, or a contract been created, under the state law. This exception, however, has the following qualification: If the question is one of doubt, or, as happily expressed in

some of the opinions of this court, "balanced in doubt," this court will follow the decisions of the highest court of the state.

We respectfully submit that unless this court can say that it is too clear to admit of serious doubt that the interpretation by the state courts is correct, then, in view of the long and unvarying line of decisions of the state court, and in view of the decisions of this court upon the Federal Land Laws, which are quite similar to the laws involved here, there needs must arise in the minds of this court a grave doubt as to whether the contention of the plaintiffs in error is correct. In other words, if one approaches this question with an unbiased mind, then, after reading the decisions of the state Supreme Court and this court upon similar questions, a serious doubt must arise in his mind as to the correctness of the contention of the plaintiffs in error, and in case of such a doubt in the minds of this court, then, under the decisions to be cited, the defendants in error are entitled to an affirmance of the judgment of the lower court.

As supporting this doctrine we refer to the following authorities:

In *Burgess v. Seligman*, 107 U. S. 365, 27 L. E. 359, it is said:

"We do not consider ourselves bound to follow the decision of the state court in this

case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. The federal courts have an independent jurisdiction in the administration of the state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment: as they also always do in reference to the doctrines of commercial law and general jurisprudence.

“So when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions or when there has been

no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts if the question to them seems balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid and in most cases do avoid any unseemly conflict with the well considered decisions of the state courts."

The case of *Board of Liquidation v. Louisiana ex rel Wilder*, 179 U. S. 354, 45 L. E. 347, involved the validity of certain bonds issued by the city of New Orleans, and which it was claimed affected earlier contracts of the city, or rights created under a prior law. The Supreme Court of Louisiana held that the bonds did not affect the prior rights or contracts, but were subordinate to them.

This court in its opinion, p. 354 (L. E. 638) said:

"When the jurisdiction of this court is invoked because of the asserted impairment of contract rights, arising from the effect given to subsequent legislation, it is our duty to exercise an independent judg-

ment as to the nature and scope of the contract. Nevertheless, when the contract which, it is alleged, has been impaired, arises from a state statute, as said in *Burgess v. Seligman*, 107 U. S. 34, 27 L. E. 365, 2 Sup. Ct. Rep. 10, 'for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt.'

"It is indeed disputable, as a matter of independent judgment, whether the rights of the contract creditors were as broad as the court below held them to be. *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623. Considering the many, and in some respects ambiguous, statutes of the state of Louisiana, which are the sources of the contract rights, and permitting the opinion as to those rights entertained by the Supreme Court of the state of Louisiana to operate upon the doubt which must arise from a review of the statutes alone, we conclude, as a matter of independent judgment, that the contract rights were correctly defined by the Supreme Court of the state of Louisiana."

The case of *Freeport Water Co. v. Freeport*, 180 U. S. 693, 45 L. E. 679, came to this court upon writ of error to the Supreme Court of Illinois. There was presented the question of the validity of a contract between the city of Freeport and the Water Company wherein the city bound itself not to regulate the rates

to be charged for water by the company for a term of years.

Subsequently the rates were changed by the city, and the company claimed its contract rights had been impaired.

This court held that municipal corporations could be vested with power to make such inviolable contracts, but held further that in determining the question of the power of the municipality it would follow the decisions of the Supreme Court of the state in the particular case. After quoting from certain Illinois cases the court said (p. 595 L. E. 687):

"It is true that we do not necessarily have to follow this decision. When Sec. 10, Article 1, is invoked we decide for ourselves the fact of contract,—not only its formal execution, but its legal basis in law, and therefore construe for ourselves the statutes of the state upon which it is claimed to rest. In such case, we have also said, we are disposed to incline to agreement with the state court. These principles hardly need the citation of cases. They have become elementary. We may quote, however, the language of Mr. Justice Bradley in *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, 2 Sup. Ct. Rep. 10."

The court then quoted from the *Burgess-Seligman* case, and after further discussion said (597 L. E. 688):

"But assuming that Sec. 9 of the general incorporation act is correctly interpreted by plaintiff, we are brought to the question of the power of the city to make an irrevocable contract for thirty years, fixing water rates. The power is claimed under the statutes of 1872, heretofore quoted. The Supreme Court of the state, as we have seen, decided against the claim, and the principle of *Burgess v. Seligman* applies if the ruling of the court and the contention of the plaintiff is 'balanced with doubt.' There were no previous interpretations of the statutes by the state courts upon which the plaintiff had a right to rely. It acted upon the faith of the statute alone, and committed its rights to a judicial interpretation of the statute."

It is true that four justices dissented, but in the dissenting opinion written by Justice White (now Mr. Chief Justice White), the rule that in case of doubt this court would follow the state court was clearly set forth as follows (p. 610, L. E. 693):

"Before approaching the text of the statutes it is well to state the scope of the duty which devolves upon this court in determining whether there was a contract, and the principles which must control in doing so. It is elementary, that where a contract is asserted to have been impaired by subsequent state legislation, this court is constrained to form an independent judgment as to the existence of the contract and its terms. It is equally true that where the contract originates from a state statute, if, in the exercise of an independ-

ent judgment, the existence or nature of the contract becomes balanced in doubt, such doubt will be resolved in favor of the construction given to the state statute by the court of last resort of the state. But this qualification is not a limitation upon the duty to form an independent judgment, and does not imply that, because the statute has been construed against the contract by the state court, therefore the matter is 'balanced in doubt.' If the rule did so imply, it would follow that in every case where a right arose from a state statute, and the court below held there was no contract, the review of that question in this court would be wholly nugatory, since the decision below would engender the doubt, and where doubt arose the decision of the state court would have to be followed. The rule, then, to be applied when the matter is balanced in doubt, is this, and nothing more, that if in using its independent judgment as it is its duty to do, a serious doubt arises in the mind of the court, then the interpretation by the state court, acting upon a serious doubt created by the exercise of independent judgment, will cause such judgment to preponderate in favor of the construction given by the state court to its own statute. *New Orleans Bd. of Liquidation v. Louisiana*, 179 U. S. 622, 638, ante, 347, 353, 21 Sup. Ct. Rep. 263."

Vicksburg v. Vicksburg Water Works, 206 U. S. 506, 51 L. E. 1155, was on appeal from the U. S. Circuit Court. In that case again the question of a city's power to contract with

a Water Company for fixed water rates for a term of years arose.

Here again this court followed the decisions of the Supreme Court of the state.

On p. 507, L. E. 1160, the court said:

"In the cases generally in this court it will be found that, in determining the matter of contract, the local decisions have been given much weight and, ordinarily, followed. As this is a Mississippi contract, and the power was exercised under the authority of an act of the legislature of that state, we naturally look to the decisions of the courts of that state, particularly to such as had given construction to similar characters at the time the contract was made, with a view to determining the extent of the power conferred."

Then after quoting extensively from Mississippi cases upholding the power of cities to make such contracts in that state, this court upon the authority of those cases affirmed the judgment.

So we have this court in the case last cited holding that a city has power to make a binding contract for fixed water rates, and in the Illinois, 180 U. S. 693, *supra*, case holding it has not, determining each case in accordance with the decisions of the courts of the state construing the state laws.

See also *Yazoo & Miss. Val. R. R. Co. v. Adams*, 181 U. S. 1012, 45 L. E. 1011.

That case came up upon error from the Supreme Court of Mississippi. Certain railroad companies had consolidated under the laws of Mississippi.

Prior to such consolidation a law had been passed imposing taxes upon corporations to which the old corporations were not subject. The question arose, was the consolidated corporation a new corporation subject to the tax? It was contended on behalf of the Railroad Company that it was not a new corporation, but a mere continuation or a successor to its constituent companies. The Supreme Court of Mississippi held that the consolidated company was a new company, and subject to the tax. That ruling was followed by this court.

Later a petition for rehearing was filed upon the ground that the tax for the year 1892 accrued prior to the consolidation, and that as to such part of the taxes the judgment gave a retrospective effect. This court, after quoting from the State Supreme Court's opinion, 77 Miss. 270-316, holding that the tax did not accrue until after consolidation, said, p. 583 (L. E. 1013):

"Whether this opinion be conclusive upon us in view of the argument that a contract has been impaired in violation of the constitution, we do not feel called upon to decide. The statutes of the state of Mississippi necessary to be considered for the

purpose of ascertaining whether the taxes for the year 1892 accrued prior to October 24 of that year are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such statutes; and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state."

In *Milwaukee Elec. R. & L. Co. v. Railroad Com.*, cited in U. S. Adv. Ops. 1914, pp. 823-4, it is said:

"It is true that this court has repeatedly held that the discharge of the duty imposed upon it by the constitution to make effectual the provision that no state shall pass any law impairing the obligation of a contract requires this court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the states. While this is so, it has been frequently held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state, in determining its meaning much consideration is given to the decisions of the highest court of the state. Among

other cases which have asserted this principle are *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. Ed. 679, 21 Sup. Ct. Rep. 493, and *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 509, 51 L. Ed. 1155, 1160, 27 Sup. Ct. Rep. 762." * * *

After discussion of the decision of the Supreme Court of Wisconsin this court continued:

"While it is true that the opinion of the chief justice in this case was concurred in by only two other judges of the six who sat on this appeal, in view of the decision of the same court in the *Manotowoc* case, we can have no doubt that the judicial interpretation of sec. 1862 by the highest court of the state of Wisconsin denies authority to municipal corporations to make contracts concluding the state from the future exercising of its power to fix the rates which may be charged by such public service corporations as are here involved.

"In view of the weight which this court gives in deciding questions involving the construction of legislative acts to decisions of the highest courts of the states in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the rights to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed."

The last case involved the construction of the provisions of Wis. Rev. St. 1860, sec. 1862, em-

powering municipalities to grant the use of streets to street railway companies. It was claimed by a railroad company under such a grant that the state was prevented from subsequently exercising power to change the rates provided for in the grant by legislative action.

The Supreme Court of the state held that municipalities were not authorized to make such a contract.

The foregoing cases fully support our contention that if this court is in doubt as to the proper interpretation to be placed upon the California laws the decisions of our state court should be followed.

In this connection we refer to what was said by Judge Field in the case of *Campbell v. Wade*, 132 U. S. 34-37, 33 L. E. 340.

In construing a Texas statute somewhat similar to the California Acts that learned justice said:

"It was contended in the state courts, and the contention is renewed here, that the petitioner, by his application for a survey, had acquired a vested interest in the lands he desired to purchase, which could not be impaired by their subsequent withdrawal from sale. This position is clearly untenable. The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the state. The application was to be followed by a survey,

and the surveyor was allowed three months in which to make it. By the express terms of the act, it was only after the return and filing in the General Land Office of the surveyor's certificate, map and field notes of the survey, that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter. But for this declaration of the act, we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the state."

CONTENTION OF PLAINTIFF IN ERROR.

We will now briefly state the position of plaintiffs in error and our reply.

It is claimed in the brief of plaintiffs in error—

FIRST: That this court should follow the opinion of Judge Deady in *Pennoyer v. MacConnachie*, *supra*, under the Oregon law.

We reply that the California statutes are essentially different from the Oregon law, and more nearly analogous to the Federal Land Laws.

SECOND: That the preemption cases are not authority because they refer to unsurveyed lands of the United States which were never authorized to be sold by proclamation of the president.

We reply true, and yet the basic reason for the decisions in those cases is the same as under

the California statutes, to-wit, that a sound construction of the law leads to the conclusion that the government did not intend to part with any interest in the land until all the various steps required of the applicant by the law had been taken, including payment of part of the purchase price, and that prior to payment the settler was under no obligation to complete the purchase, and acquired merely a preference over other later settlers or applicants to purchase in case the lands were not otherwise disposed of or the law repealed.

THIRD: That a consideration moved to the state on account of the detriment incurred by the applicant through payment of fees and for making the survey.

We reply that no such consideration has ever been recognized in like cases, though necessarily all cases of this character have involved expenditures on the part of the intending purchaser in attempting to acquire the land applied for by him; and, further, that it has been held in this state that such fees do not constitute consideration.

FOURTH: That an implied obligation to pay to the state the purchase price of the land arose when the applicant filed his application, which is sufficient to support a contract with the state.

We reply that the contrary has been held by our Supreme Court from a very early period, and the contrary doctrine has been firmly established by this court in similar cases.

FIFTH: That the Act of 1870, amending sec. 70 of the Act of 1868 and sec. 3488 of the Political Code, simply excluded the lands reserved in those sections from sale under the Act of 1868 and the Code respectively, and did not affect rights preserved by the saving clause in sec. 71 of the Act of 1868 and sec. 18 of the Political Code.

We reply that the right reserved by the saving clause of 1868 was the mere preference to purchase if the lands should not be reserved; that the Act of 1868 is a reenactment of the Act of 1863, and continued in force the provisions of that act which were reenacted through the Act of 1868, the latter being a mere continuation of the former, and that the Act of 1870 expressly repealed all acts, or parts of acts, inconsistent therewith, and thereby repealed the saving clause in the Act of 1868, and after the repeal of that clause there was no right of any kind in Mr. Banning to be preserved by sec. 18 of the Political Code.

SIXTH: That the decree of the District Court in the contest between McFadden and Banning

is *res adjudicata* of the questions presented in this case as against the state.

We reply that the state was not a party, and no issues between the state and Banning were or could have been presented in that case; that the court was, by the statute, simply substituted for the surveyor general as the agent of the state to determine the contest between the parties; that neither had jurisdiction to determine anything else, and that this court should follow the decision of the state court in construing secs. 3414 and 3415 of the Political Code.

Finally, we say generally in answer, that the lands in question cover nearly one-half of the Inner Bay of San Pedro, now the Inner Harbor of Los Angeles, and practically the entire waterfront of the old seaport of Wilmington, extending nearly one mile into the bay; that even if we assume some kind of interest had vested in Banning through his application or through the decree in the contest case, still the state under the doctrine of the Chicago case had the power to retake this interest and exercised that power through the constitution of 1879, if not by the earlier statutes, and that as no consideration had been paid for the land, no compensation had to be paid to Mr. Banning.

DISCUSSION IN DETAIL OF THE ARGUMENT OF
PLAINTIFFS IN ERROR.

In their elaborate brief counsel for plaintiffs in error base their arguments on the main branch of this case upon the following propositions: That under the Oregon statute authorizing the sale of swamp and overflowed lands Judge Deady held the filing of an application to purchase any of its lands constituted an acceptance of the offer by the state to sell the same and constituted a binding contract (*Pennoyer v. MacConnachie*, 43 Fed. 196), and that this court upon appeal of said case in 140 U. S. 1, 35 L. E. 363, stated that the views of Judge Deady were very forcible, and would be conclusive except for the suggestion that the bare application itself, unaccompanied by payment, partakes somewhat of the nature of a preemption claim and confers no vested right, citing the Yosemite Valley case and the case of *Frisbie v. Whitney*, *supra*. Counsel urge that the cases of the preemption claimants are so utterly different from that of an applicant under the Oregon law or the California law that such cases are no authority, and that if they can convince this court of such fact then this court stands committed to the opinion expressed in the *Pennoyer* case, that the views expressed by Judge Deady are very forcible and are conclusive. Counsel

thereupon proceed with an analysis of the preemption laws of the United States.

Counsel next claim that a consideration has been paid by the applicant and is deemed to have been received by the state growing out of the payment of fees for the application and the survey, on account of such payments being a detriment to the applicant; and they urge further, with great earnestness, that there is an implied promise on the part of the applicant to pay for the land the moment the application is filed, which itself constitutes a consideration moving to the state.

We will first consider the case of *Pennoyer v. McConnachie*, *supra*.

In the opinion of this court in the same case upon appeal, 140 U. S. 135, L. L., it was said (p. 369):

“We think this view very forcible, and it would be conclusive to our minds but for the consideration which suggests itself that the bare application itself, unaccompanied by the payment of any consideration, partakes somewhat of the nature of a preemption claim under the laws of the United States, with reference to which it has been held that the occupancy and improvement of the land by the settler, and the filing of the declaratory statement of such fact, confers no vested right upon him, as against the government of the United States, until all the preliminary acts prescribed by law,

including the payment of the price, are complied with. *Yosemite Valley Case*, 82 U. S. 15 Wall. 77 (21, 82); *Frisbie v. Whitney*, 76 U. S. 9 Wall. 187 (19, 668).

"But we do not deem it necessary to determine whether the court was correct in that view of the case, for, in our opinion, another element of the case is of sufficient importance to control its disposition."

This court then held that the judgment should be affirmed for reasons other than those expressed by Judge Deady.

We are thoroughly satisfied that the opinion of Judge Deady should not and cannot influence this court against the overwhelming authorities from our own state construing our own laws upon lines similar to the construction placed by this court upon the United States laws. However, even if Judge Deady's dictum was good law under the Oregon statute, still there are important distinctions between the two cases.

FIRST: The Oregon statute dealt with swamp lands only, which are purely proprietary lands, held by the state as any other property of a proprietary nature, whereas the lands with which we are now concerned are tide lands, part of a navigable bay, held by virtue of the state's sovereignty, and specifically devoted to public use by the terms of the Constitution of the state of California, and the power of disposition of such lands is more limited, and the rules of in-

terpretation as to contracts or statutes relating thereto are more favorable to the government, than in the case of ordinary public lands.

SECOND: The plan provided by the Oregon statute for selection, survey and sale of its swamp and overflowed lands is essentially different from that provided by the California statutes.

By the first and second sections of the Oregon law authorizing the sale of swamp and overflowed lands of that state the office of commissioner of lands was created, who was empowered to cause to be surveyed and selected all the swamp and overflowed lands of the state, and maps and descriptions of such selections were required to be filed in the office of the county clerk of the county in which the lands were located. This county clerk was required to file with the commissioner a certificate showing that the maps and descriptions had been filed, and the commissioner thereupon was required to give public notice of the completion, approval and filing for four weeks in some newspaper published in the county. Section 3 provided:

"The swamp and overflowed lands of this state shall be sold by said commissioner at a price not less than one dollar per acre in gold coin. Any person over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration to become a citizen, as required by

the naturalization laws, may become an applicant for the purchase of any tract or tracts of said swamp and overflowed lands, upon filing his application therefor (describing the tract or tracts he desires to purchase), by the actual survey; or, if no survey has been made, then by fences, ditches, monuments or other artificial or natural landmarks, with said commissioner, whose duty it shall be to immediately indorse thereon the actual date of such filing. In case of adverse applicants for the same tract or parcel of swamp land, it shall be the duty of said commissioner to sell the same to the legal applicant therefor whose application is first filed. Within ninety days after the date of the public notice provided in section two of this act, twenty per centum of the purchase money shall be paid by the applicant to said commissioner, whose duty it shall be to issue to the applicant a receipt therefor, and the balance of the purchase money shall be paid on proof of reclamation, as hereinafter provided."

140 U. S., 35 L. E. 364.

It will be observed that the Oregon law provided a complete scheme for the selection and segregation of the swamp and overflowed lands of the state from the public domain, for their survey, and for the filing of maps and descriptions of the surveys as public records in the office of the respective county clerks. In this way there was a determination of the exact location and description of all of the swamp and

overflowed lands belonging to the state in each county preliminary to any sale of such lands being completed. Then public notice was given of the filing of the maps and descriptions, and within ninety days after such notice payment had to be made. In case an application had been filed with the commissioner prior to the selection of the lands in any county it was the duty of the commissioner to file the application; then upon the selection and survey of the swamp lands in the county having been completed, and notice having been published, the only duty required of the commissioner was to accept payment from the applicant for the land if the land applied for was a part of the swamp and overflowed lands of the state as shown by the maps and surveys filed with the county clerk.

On the other hand, if an application was filed after the surveys were made and filed with the county clerk, then the applicant was required to describe the land according to the actual survey, and this application had to be received by the commissioner and filed by him. After publication of the notice required, and within ninety days, if the applicant presented the necessary 20% of the purchase price, it was the duty of the commissioner to receive the same.

His work after completion of the selection and surveys was practically clerical only. Aside from the duty of receiving the purchase money,

or filing the applications as presented, the only function that he could perform was a comparison of the applications with the surveyed lands to see if the applications covered any portion of the surveyed lands. If they did so, it was his duty to receive the payment. The clerk of the county could just as well have performed all the duties which the commissioner performed after the selection was completed and the notice given in so far as any duty was cast upon him.

Contrast this with the California law. In this state there was never any general plan adopted for the selection and survey of all of the swamp and overflowed lands, or for any general survey of the tide lands. In 1863 the public land surveys of the United States in the state of California had not been completed, so that considerable numbers of the sixteenth and thirty-sixth sections had never been surveyed. There were many unadjusted Mexican and Spanish grants covering portions of the state lands. There were several grants of public lands of the state for school and public purposes other than the sixteenth and thirty-sixth sections. These had to be located. The state was entitled to lands in lieu of the school lands granted where the same could not be selected by the state for any reason. These lieu lands had to be located. The United States public land surveys never extended to the state tide lands. That there had

been no general survey by the United States of the swamp, overflowed and salt marsh lands appears from the fact that both in the Acts of 1863 and of 1868, and in the Political Code adopted in 1872, all applications for swamp, overflowed, salt marsh and tide lands were filed with the county surveyor, whose duty it was to make a survey of them.

Under the law of 1863 this was specially provided also with reference to all unsurveyed school lands, and the same was required by the Act of 1868.

So in all cases, and for all classes of unsurveyed lands, under the California system, selection or survey of the specific parcel of land followed after an application had been made, instead of a general plan by which all of the state lands of a certain class in any county were first selected and surveyed, with correct maps and descriptions, and public notice given of such filing, with opportunity to applicants to come in and make applications based upon such maps, as in the case of the Oregon statute. In California each purchase was based upon a selection by the applicant out of the general body of unsurveyed lands, an individual survey made by the county surveyor, and filed with the state surveyor general, or, in the case of school lands, a certificate of location following a survey and filed with the state surveyor general. After this

survey or location was filed with the state surveyor general another important step was required, and that was the approval of the surveyor general. This could not be made until the expiration of thirty days under the Act of 1863, and, under the Act of 1868, as amended in 1870, until the expiration of six months. During this time the surveyor-general was required to carefully compare the surveys or the location with the other maps and records in his office for the purpose of ascertaining whether the lands as surveyed included lands which should not be included, and whether they entrenched upon any Mexican grants, or included lands already filed upon, or lands below low tide, and if after such comparison it was found that there was no conflict and that the law had been complied with it was his duty to approve the same. But even then the applicant was not obligated to pay for the land. He could exercise his privilege of paying or not, as he chose.

The reason for requiring the approval of the surveyor general under the California statute is undoubtedly the same as this court said was the reason for requiring the return, approval, and record of the survey made for an applicant under the New Madrid Act.

Bagnell v. Broderick, 13 Peters 463, 10 L. E. 237.

Said the court:

"The United States never deemed the land appropriated until the survey was returned, for the reason that there were many suits and claims emanating from the provincial governments of France and Spain, and others from the United States in the land district where the New Madrid claims were subject to be located, so there were lead mines and salt springs excluded from entry. Then, again, the notice of entry might be in a form inconsistent with the laws of the United States, in all which cases no survey could be made in conformity to it. If no such objection existed it was the duty of the surveyor to conform to the election made by the claimant having the location certificate from the recorder."

It is true our courts hold that no contract exists until payment, while this court held in the cases under the New Madrid Act that a contract arose upon the return and approval of the survey, but there is really no difference, because under the New Madrid Act payment, that is to say, vesting of the injured land in the United States, accrued simultaneously with completion of the location, which was the return of the survey and its recording and approval by the recorder.

On the other hand, the purposes of the law and the nature of the duties of the surveyor general are illustrated in sec. 14 of the Act of 1868,

and sec. 3414 of the Political Code, which are more explicit than the corresponding section 27 of the Act of 1863.

Sec. 3414 provided as follows:

"When a contest arises concerning the approval of a survey or location before the surveyor general, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the District Court of the county in which the land is situated, and must enter such order in a record book in his office."

It is also manifest that these same duties were imposed upon him whenever he was required to approve a survey whether there was a contest or not.

There could not arise under the Oregon law any question as to survey, or as to whether the land applied for is a part of the swamp and overflowed lands of the state, or whether it is included within any grant, for the reason that the segregation and survey of the lands had

already been made by the state before the lands were offered for sale. The sole duty of the Oregon official was to receive payment, except that it may be assumed he had to compare the description of the land in the application with the maps in his office. Then his duty seemed to end.

Nothing could better illustrate the importance of the duty of the surveyor general, nor its effect upon the proceedings, than this very case.

As will be seen from the map attached to this brief, the lands which were finally patented to Phineas Banning extend for something over two miles across the Bay of Wilmington in front of the town, and for nearly a mile into the bay. They embrace fractional parts of sections 5, 6 and 7. The original application and survey filed in 1866 embraced a fractional one-half of section 8, which, of course, was southerly of the lands patented, and probably covered portions of the channel, or, possibly, part of the island known as Smith Island immediately south of this land, or might have conflicted with the Mexican grants which surround the bay. This survey was erroneous—that much appears from the record [Tr. fol. 193], and we find in 1877 a new survey was made, and this survey omitted entirely the fractional half of section 8. As the original survey was erroneous, it followed

logically that the surveyor general was under no duty to approve it—in fact, could not legally have approved it. There was no provision in the law for the surveyor general approving a portion of the survey and excluding other portions. As the surveyor general was under no duty and without authority to approve this survey, because the survey was erroneous, Phineas Banning had not even a preference right to purchase the lands described in the survey. Before any amendatory survey, which was the correct survey, was filed the lands under two separate laws of the state of California had been excluded from sale under those laws which laws were in effect merely continuations of the old law.

COMPARISON WITH THE PREEMPTION LAWS.

The case of *Frisbie v. Whitney*, *supra*, and the Yosemite case, *supra*, arose under settlements made under the Act of Congress of date Sept. 4th, 1841, amended by the Act of May 30th, 1862 (Revised Statutes, Title XXXII, chap. four, 2256-2288).

Section 10 of the law of 1841 relating to public lands, substantially the same as section 2259 of the Revised Statutes, provided that every person being the head of a family, etc., and a citizen of the United States, or having filed a declaration of intention to become such, who had

made, or thereafter made, a settlement in person upon public lands to which the Indian title had been extinguished, and which had been, or should be, surveyed prior thereto, and who should inhabit and improve the same, and should erect a dwelling thereon, should be authorized to enter such lands not exceeding 160 acres.

Prior to 1862 this section defined and declared what lands of the United States were subject to preemption. In other words, it was those upon which a settlement had been made and which had been surveyed prior to such settlement.

The Act of 1862 provided all lands belonging to the United States to which the Indian title had been, or might thereafter be, extinguished should be subject to the right of preemption under the conditions, restrictions and stipulations provided by law. (Sec. 2257, Rev. Stat.)

Section 2258 prescribed certain exceptions which it is not necessary to set forth.

The passage of the law of 1862 providing that all lands of the United States to which the Indian title has been, or may be, extinguished shall be subject to the right of preemption, unquestionably by fair construction extended the right of preemption to unsurveyed lands with the same effect as though the law of 1841 had been amended as to section 10 thereof above referred to by striking out the words "which has been or shall have been surveyed prior thereto," so that

as the law stood at the time of the settlement in the two cases above referred to respectively, the United States had declared that all of its public lands, surveyed and unsurveyed, were open to settlement, and there was granted to every person being the head of a family who should enter upon the public land to which the Indian title had been extinguished, and who should improve and inhabit the same and erect a dwelling house thereon, the right to enter with the register of the land office for the district in which such land lay by legal subdivision any number of acres not exceeding 160 acres.

It is true the various provisions of this law, most of which are admirably set forth in the case of *Northern Pacific Railroad Company v. Delacey*, 174 U. S. 622-628, quoted from in the brief of plaintiffs in error, made no provision for a special survey of the unsurveyed lands upon which a settler should make improvement, so that no formal declaratory statement could be made by him because he could not give a proper description, until a public survey of the lands had been made by the government, and he was required to file his declaratory statement within three months after the filing of the plot of the survey, and to make payment after proclamation of the president that the lands were offered for sale, and before such sale should take place.

Here seems to be a very complete scheme for

the sale of the unsurveyed lands, and, as one of the objects of the law was to encourage settlement, in the absence of any controlling provisions or principles underlying the interpretation of the law, a strong equity would seem to arise in favor of any settler who upon the faith of this offer or authorization on the part of the government should accept the same by moving upon the lands, making his residence there, improving the same with a dwelling, and doing all that he could do before the actual survey of the land to perfect his title and to comply with the law. In the absence of such controlling provisions or principles of interpretation, it could be claimed with as much force on behalf of the hardy settler who had probably staked his all in an effort to settle upon and improve a portion of the public domain and obtain the title thereto as it could be claimed for the applicant under the Oregon law, that the United States had offered its unsurveyed lands to any one who would comply with the law, and that the compliance with the law in all respects except the one of filing his declaratory statement, which was delayed on account of the failure of the United States itself to extend its public surveys to the land, constituted an acceptance of the offer of the government, and hence under the principle of the Oregon case a contract would arise.

There are no explicit provisions in this law that prior to entry and payment the settler acquires no rights as against the government, but an interpretation to such effect was read into the law in the very able opinions of this court rendered first in the case of *Frisbie v. Whitney*, *supra*, and later in a more elaborate opinion in the Yosemite case.

The early case based its decision upon the opinions of the attorney general, and also upon the decisions of the courts of Missouri, Mississippi, Illinois and California (*People v. Shearer*, 30 Cal., *supra*, among others), which were described in the opinion as "States in which the population is largely interested in the liberal operation of the preemption laws"; and in reply to the argument, which was urged with much zeal, that because complainant did all that was in the power of any one to do towards perfecting his claim he should not be held responsible for what could not be done, the court referred to the reply to a similar argument in a case arising under the law for the New Madrid earthquake sufferers that the rights of a claimant are to be measured by the acts of Congress and not by what he may or may not be able to do, and if a sound construction of those acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions

whether they be hard or lenient. The court then referred to decisions under the New Madrid law as asserting principles similar to those thus announced.

It will be noted, as stated above, that, under the sound construction which is referred to by the court, there was read into the law the conditions that the preemptor should be authorized to enter the lands after making such settlement, improvement and residence *provided the same shall not have been reserved or other disposition made of them before entry and payment.*

When the question came up again in the Yosemite case, *supra*, Mr. Justice Field felt called upon to enter into a more elaborate discussion of the question than that in the preceding case in order to justify the conclusion of the court.

One of the reasons which impelled the court to the ultimate conclusion was that of public policy, having regard to the powers and duties of the government in its governmental capacity in the handling and disposition of the public domain, the learned justice stating that the contrary rule would deprive Congress of the power to reserve lands for public uses though needed for strictly governmental purposes, such as fortifications, light houses, custom houses, or any of the other numerous public purposes which were strictly governmental in their nature.

Consider the case of the settler in the case of *Frisbie v. Whitney*. The settler in that case went upon the land with the intention of purchasing it. It was at that time open to pre-emption settlement. He improved the land, built his residence, and resided upon it. He first offered to file his declaratory statement with the local office, but was refused because the land had not then been actually surveyed. Later the land was surveyed, and he again offered to file his declaratory statement, but was refused because in the meanwhile Congress had passed an act authorizing the sale of the land to another class of persons. It is true there was some question raised as to Whitney's rights because he had entered with violence, but the court assumed that he was a *bona fide* settler and had done all that the law required prior to filing his declaratory statement. The court under a sound construction of the law, justified, not only by the terms of the law, but by the rules of interpretation in all cases where a government grant is involved, that in cases of doubt the interpretation shall lean to the public right, held that he had acquired no vested right. In later cases the court gave as a further reason that since the lands might never be offered for sale no right to purchase the lands could be acquired by the preliminary steps, and the condition was read into the law that the settler only had the right

to finally purchase the lands in case the same were offered for sale in the usual manner, that is, by proclamation of the president, and that Congress reserved the right by implication to make other disposition of the lands before entry and payment by the settler.

Comparing the law of the state of California with the preemption laws we find that unsurveyed lands of the state were authorized to be sold, but the survey and selection of those lands was, in the first instance, left to the applicant himself, through the county surveyor, the survey was required to be approved, and within a certain time after approval the applicant could make the payment and receive a certificate of purchase.

We find that the courts of California from a very early date following its own decision under the preemption laws, the Supreme Court of that state having as early as 1864 held that the United States could withdraw its public lands even after settlement, decided that the applicant under the state laws, obtained, prior to payment, a mere privilege or right to purchase the lands provided the law was not subsequently changed or the lands reserved, and this, as in the case of the United States, was based upon a careful consideration of the various provisions of the law, and upon a sound construction having a just regard, not only to the rights of the appli-

cant, but to the powers and duties of the state in its governmental capacity.

On questions of public policy we submit that if such consideration is potent in guiding the conclusions of this court with reference to the general public domain, with ten-fold force it should apply to the interpretation to be placed upon the law authorizing the sale of tide lands held by virtue of the sovereignty of a state if under a different interpretation it was possible, as here, to acquire patents to the entire tide lands embracing nearly all of the navigable waters of an entire bay, and, as in this particular case, covering practically one-half of the bay and the water front of the chief seaport of Southern California. In the interpretation of such laws all questions of doubt must be solved in favor of the government.

The construction of our state laws above referred to became a part of the law of this state with reference to the sale of school lands nearly fifty years ago, the gist of the decision being that the applicant obtained no contract rights by virtue of his application or certificate of location and incurred no contract liability—that he had a mere privilege of purchase or not as he saw fit—; and nearly a score of years ago the same rule was applied to tide lands, and such has remained the law of this state with reference to its public lands under the Act of 1863, re-en-

acted in 1868, and in the Code, for practically a half century.

COMPARISON WITH CASES UNDER THE ACT FOR
THE RELIEF OF THE NEW MADRID EARTH-
QUAKE SUFFERERS.

We will briefly compare the provisions of the New Madrid relief law with those of the laws under discussion here.

That act was one to relieve persons whose lands had been materially injured by the New Madrid earthquake. The recorder of land titles of the district was vested with power to determine what persons were entitled to relief.

The steps required to be taken were as follows, as set forth in the opinion of the court in the *Hot Springs Cases*, 92 U. S. 698, 23 L. E. 694. The court said:

"These are the substantial provisions of the act. As apparent on its face, it required the following steps to be taken:

"1. Application to the recorder of land titles, showing the party's claim, and praying a certificate of location.

"2. Certificate of location issued by the recorder, showing the amount of land to which the applicant was entitled.

"3. Application to the surveyor, presenting the certificate of location, and designating the lands which the party desired to appropriate.

"4. Survey and plat made by the surveyor.

"5. Return of the survey and plat to the recorder of land titles to be filed and recorded, with a notice designating the tract located and the name of the claimant.

"6. Certificate of the recorder, stating the facts, and that the party was entitled to a patent.

"7. Transmission of this certificate to the General Land Office.

"8. The patent.

"In addition to these requisites, the land thus appropriated must be located on the public lands of the territory, the sale of which was authorized by law."

The law also provided that when the location was made the title of the person to the land injured should revert to, and become absolute in, the United States.

It will thus be seen that the law itself fixed the time and manner of payment| In other words, the substituted land was paid for by the vesting of the title of the injured lands in the United States, and this took place at the time the location was completed, and such was the interpretation given the law by this court in the several cases already referred to; and it was held that the location did not become complete until the survey and plot were returned by the surveyor, were filed and recorded by the recorder of land titles, and approved by him.

As shown by the decisions already cited this court has uniformly held that until the final step

was taken no rights as against the United States became vested in the applicant.

There is a strong similarity in the proceedings under the two laws. The tide lands of the state of California were not, nor were the swamp and overflowed lands of the state of California, defined lands in 1863 or in 1868, or at any time, as contended for by plaintiffs in error (pp. 44, 45 of brief), if the word "defined" is used in the sense in which it was evidently intended to be used by plaintiffs in error as being lands definitely located by definite description, and survey and in the early years this was true of large portions of the lands granted to the state for various school and other public purposes. Part of the school lands remained unsurveyed while the tide lands were an undefined strip extending from Oregon to Lower California along the coast and in the bays, estuaries and lagoons found in various places along the western boundary, and the salt marsh lands constituted large areas adjoining the tide lands in such bays and lagoons. The swamp and overflowed lands had likewise not been surveyed or segregated. In every law passed relating to the sale of swamp, overflowed, salt marsh and tide lands since 1863 the county surveyor has been required to make the survey. In other words, the state authorized a sale of all of its public lands, with certain exceptions, but included certain classes

which were unsurveyed. Under the California law, as under the New Madrid law, the applicant himself selected and caused to be surveyed the lands which he had selected. Under the California law, as under the New Madrid law, this survey was required to be returned to the surveyor general, in the one case, and to the recorder of land titles in the other, and under both laws the survey was required to be approved by the respective officers. Under the federal law at this junction a contract immediately arose because simultaneously with the approval of the survey and plot by the recorder of titles the location of the applicant became completed, and the consideration moving from him to the United States at once vested in the United States, to-wit, the injured land, and he became simultaneously entitled to a patent for the selected lands. Under the state law, on the other hand, the consideration for the lands was not paid at the time of approval, but the applicant was allowed thirty days within which to make the first payment, during which time it was his option to either pay or not to pay as he chose, there being no contract liability assumed by him by virtue of the prior proceedings. Upon payment being made by him then for the first time a contract was created between him and the state of California, and the contract of sale in

the form of a certificate of purchase was issued to him.

In the New Madrid cases the principle upon which the decisions are based is that prior to payment no contract arose. The same principle is announced in the preemption cases, and the same in the decisions of the state of California under its land laws. All are founded upon the principle that the laws contemplated that all of the required steps should be taken before any vested right was created in the applicant, and all give as one of the reasons for this holding that the applicant or settler acquired a mere privilege of purchase superior to that of later applicants, which it was optional with him to exercise or not as he saw fit, but the government was under no obligation to continue the law in force nor to refrain from withdrawing the lands from sale prior to payment.

We thus find that the decisions of the state of California under its land laws are in harmony with the decisions of this court under the federal laws.

COMPARISON WITH THE CASES ARISING UNDER THE TEXAS STATUTE.

Questions similar to those involved here arose in the case of *Campbell v. Wade*, 132 U. S. 34-37, 33 L. E. 340.

The law involved in these cases was one au-

thorizing the sale of a large tract of land belonging to the state of Texas. The statute provided that any person desiring to purchase any of the unappropriated lands might do so by causing the tract desired to be purchased to be surveyed by the authorized public surveyor of the county or district in which the land was situated. It was made the duty of the surveyor to survey the land within three months, and within sixty days after the survey to certify and record a map and field notes of the survey, and return and file the same in the General Land Office.

Section 5 is as follows:

“Within sixty days after the return to and filing in the General Land Office of the surveyor’s certificate, map and field notes of the land desired to be purchased, it shall be the right of the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the state the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the General Land Office of the receipt of the state treasurer for such purchase money, said commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so conveyed and paid for.”

See *Telfener v. Russ*, 145 U. S. 522-523, 36 L. E. 800-802, where these provisions were referred to.

In the case of *Campbell v. Wade, supra*, an applicant had made his application for a survey, had paid the necessary fees (and, by the way, Justice Field specially mentions this in his opinion), but before the survey was made, and before the expiration of the time within which a survey was required to be made, the act was repealed. It was held that no contract or obligation arose by the filing of the application, and the court said that it was only after the return and filing in the General Land Office of the surveyor's certificate and map that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter, and the court added:

“But for this declaration of the act we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the state.”

The court also held in that case that the application for a survey did not bind the applicant to purchase, being the same line of reasoning that is found in all cases of this character, and in all of the decisions of this court, that no contract obligation is incurred by the applicant, and that no vested rights accrue, until all of the proceedings which are required by the statute are complied with.

Counsel for plaintiffs in error attempt to belittle the case of *Campbell v. Wade*, but it is

really very instructive. It is true the positive language of the Texas statute differs from that found in any of the other laws which we have been considering, and specifically differs from the California laws which provide for approval of the survey after a limited time, and require the purchaser within a certain time to present his copy of approval or certificate of location to the county treasurer, who was authorized to receive the amount of the purchase price in full or in part.

Counsel claim that the decision was based upon the fact that application for a survey did not bind the applicant to purchase the land, and seek to differentiate that from our statute which requires something more than the mere application for a survey to be filed with the county surveyor; but Justice Field did not hold that the application did not bind the applicant simply because it was an application for a survey. In our statutes there is not any specific requirement for an application to purchase tide lands to be filed. The statute requires an affidavit to be filed setting forth the qualifications of the purchaser, and that he is desirous of purchasing the land described in the affidavit, and there seems to be also an application for a survey filed with the county surveyor at the same time (see Sec. 7, Acts of 1863, and Sec. 29, Acts of 1868, which prescribe the duty of the county surveyor

upon receiving an application for a survey), but the two documents, the affidavit and the application for a survey, which are filed with the county surveyor, and are subsequently filed with the surveyor general, constitute an application to purchase, and are so treated in the statute.

On the other hand, under the Texas law, the applicant to purchase must have filed some sort of an application with the authorized public surveyor, and while the law is silent as to the practice doubtless the instructions to the surveyor from the General Land Office, provided for by Sec. 7 of the Texas Code, prescribe the necessary procedure—at any rate, by Sec. 9 of the act the person seeking the survey is described as the applicant to purchase, and if the application for survey is the only document which was signed and filed by such applicant then that application under the Texas statute, just as the affidavit and application for a survey under the California statute, must be deemed the application for purchase. The sole object of filing the application for a survey with the local public surveyor under the Texas statute is to apply for purchase of the land.

The decision in *Campbell v. Wade* is also instructive because Justice Field based his opinion upon the decisions in the pre-emption cases, *Frisbie v. Whitney*, *supra*, and the *Yosemite*

case, *supra*, and by analogy in conclusion the justice said:

“In the present case before the act withdrawing the land from sale, which was equivalent to a repeal of the law authorizing the sale, could be held to impair any vested right of the applicant he must have done everything required by the law to secure such right. Until then no contract could arise in any way binding upon the state.” (36 L. E. 242.)

CONSIDERATION.

Plaintiffs in error urge that the state of California became bound to sell the lands applied for—in other words, that a contract arose—because a consideration had moved from the applicant to the state in two ways,

First—Through the detriment caused the applicant by payment of fees; and,

Second—Because there is an implied promise to pay by the applicant growing out of the filing of his application, which constitutes consideration moving to the state.

Counsel have the pardonable pride of a discoverer of the first point, and urge that it was never considered by our Supreme Court in any of the cases, before the decision appealed from, and that, consequently, no one of the decisions of the state Supreme Court relating to state lands, and which are relied upon by defendants

in error, should have any controlling or persuasive influence with this court. We respectfully submit that in every case of this character that has arisen, either in the state of California or under the United States laws, or under the laws of any other state, this kind of payment has been involved, because in all cases the necessary fees must have been paid by the applicant, and in the case of the pre-emptor who has gone upon the public domain and expended time and money in the making of improvements and the building of his residence, and who has changed all of his plans so as to settle upon the property, a detriment to him far greater than any that could come from the payment of fees has occurred, so that necessarily in every case this question would be involved. If the point has never been directly passed upon. That can probably be ascribed to the fact that the courts never considered the matter of sufficient importance to justify discussion for under any system of law the initiatory steps always involve the payment of certain fees. The contention here is really based upon estoppel, and when the disappointed applicant in the New Madrid cases, or the unfortunate settler under the pre-emption laws, urged that it was a hardship upon him when he had done all in his power to perfect his claim to lose his land because the United States

had not placed the property in such condition that he could complete his entry before other disposition had been made of it, he really presented a similar plea to that court. He had been prejudiced,—had suffered loss—being led, to his injury, into his then position through the alluring invitation held out to him by the land laws. We have seen how this court answered it, and the same answer applies here.

In *Ayers v. Kingsbury*, 143 Pac. 85, our Court of Appeals held that payment of a deposit of \$20 required by the Act of 1889 supplemental to the code, did not constitute payment of part of the purchase price.

We find that in *Campbell v. Wade*, *supra*, Justice Field noted that the applicant had paid the required fees.

In so far as the offer to prove the cost of a survey by Phineas Banning is concerned, the lower court was undoubtedly correct in rejecting the testimony in any view of the case. The offer was one merely to prove by some engineer what would be the cost to make a survey of the property, though, for the purposes of the case, the court assumed that Mr. Banning paid for the surveys, both the erroneous one in 1866 and the resurvey in 1877.

IMPLIED PROMISE TO PAY.

Counsel urge with great earnestness that there was an implied promise to pay when the applicant filed his application. This is absolutely contrary to the decisions of this state, and certainly upon such a subject those decisions are controlling as they constitute an interpretation of the binding effect upon a purchaser under the state land laws, and are favorable to purchasers generally.

On page 26 of their brief counsel for plaintiffs in error say, "The record of such approval in the county surveyor's office under Sec. 1 of the act above noted (of 1863) imposes upon the purchaser the duty of making payment within thirty days of twenty per-cent of the purchase price."

This is the mere conclusion of counsel. Our decisions show that there was no duty imposed in the nature of an obligation to make the payment. He was required, however, to make the payment if he desired to exercise his privilege of purchasing.

In the case of *Eckart v. Campbell*, 39 Cal. 256, *supra*, the court said, referring to the effect of the application and the certificate of location of school lands:

"It was intended to give the person who obtained it the exclusive privilege to be-

come the purchaser of the particular premises described at any time within the fifty days from its date. It is, however, a mere privilege which he might at his option accept or decline within that time, and his failure to pay the twenty per-cent as required is conclusive evidence to the land officers that he has abandoned the privilege thus conferred upon him."

The laws themselves of 1863 and 1868 plainly indicate that prior to the issuance of the certificate of purchase there is no contract—no promise to pay on the part of the applicant—which requires any action on the part of the land officers or of the courts in case the applicant fails to make the first payment under his certificate of approval or location. There are, however, in both laws express provisions for annulling the contract in case of a failure to make any of the deferred payments after the certificate of purchase has been issued. The necessary inference is that a contract arose after the certificate of purchase was issued, but that none existed before.

Counsel in conclusion say,

"That obligation (the implied promise to pay) is the just and natural consequence of the act of the purchaser in making formal application to purchase on the terms previously offered by the state, and, therefore, is one which the law must impose in every such case."

On the other hand, if under the laws of California no such obligation was imposed upon the applicant by the preliminary proceedings, then it follows that the correct interpretation of the California laws is that there was no unqualified offer to sell a specific tract of land unqualifiedly accepted by the state so as to create an obligation. That no obligation was incurred prior to payment clearly appears from the decisions and from a careful reading of the statutes.

Also in the case of *Campbell v. Wade, supra*, involving a Texas statute, Judge Field held that no obligation to proceed with the purchase was incurred by the filing of the application for a survey with the local public surveyor.

THE ACT OF 1870 AND THE POLITICAL CODE
SEC. 3488 EACH RESERVED THE LANDS IN
SUIT FROM SALE.

Plaintiffs in error, on pp. 66 to 70 of their brief, urge that neither by the Act of 1870 nor the Political Code adopted in 1872 were any rights of the applicant, Phineas Banning, affected. This conclusion is drawn from the fact that the Act of 1868, Sec. 71, after repealing about two score or more laws relating to public lands of the state of California, contained this proviso:

“Provided, however, that the provisions of this act, shall not in any manner affect any legal or equitable claims, now existing on any of the lands hereinbefore described, in favor of any claimant under the state, nor affect any suit or proceeding which is now pending respecting the same, arising out of any claim now made; but the courts of the state may proceed and adjudicate upon said rights, and patents or other evidences of title may issue for the same to the parties entitled thereto, under any existing laws of this state the provisions of this act to the contrary notwithstanding.”

The Act of 1870 amending Sec. 70 of the Act of 1868, amended a number of other sections of that act, and specifically Sec. 70, so as to provide that all swamp and overflowed, salt marsh and tide lands within two miles of any town or village were thereby excluded from the provisions of that act. This amendatory act also contained the following provision:

“All acts, and parts of acts, inconsistent with the provisions of this act, are hereby repealed, and this act shall take effect from and after its passage.”

The saving clause contained in the Act of 1868, Sec. 71, referred to the rights which have been recognized by our courts in applicants as conditional rights, or preference rights, to purchase the land from the state as against any later applicant under the laws of the state provided such laws remained in force

or the lands were not reserved, and, of course, also embraced any rights under certificates of purchase issued under prior acts.

It will be noted that the Act of 1868, as originally passed, in Sec. 70, contained precisely the same reservation as that in the Act of 1863. The Act of 1868, as conceded by plaintiffs in error (p. 66 of brief) was merely a codification or re-enactment of the Act of 1863 in so far as they are the same, and the object and purpose of the Act of 1863 is set forth in the case of *Kimball v. McPherson*, 46 Cal. 104-108, where it was said:

"The chief purpose of that act was to reduce into one harmonious system all previous provisions for the sale of overflowed, swamp and tide lands and other lands belonging to the state, and to provide for the reclamation of the first named classes."

The Political Code was adopted in 1872, and by Sec. 3488 all swamp, overflowed, salt marsh and tide lands were excluded from the provisions of the chapter relating to the sale of such lands. By Sec. 5 of that code "the sections thereof, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof and not as new enactments." In other words, the code provisions simply continue in effect the law of 1868, (which was a re-enactment and

continuation of the law of 1863), except in so far as changes had been made by the code, particularly in Sec. 3488, where the reservation was within two miles of incorporated cities or towns, whereas under Sec. 70 of the previous act as amended in 1870, the reservation was within two miles of any town or village.

The principle set forth in Sec. 5 of the Political Code is simply an announcement of a well recognized rule which applies to the Act of 1868, that the re-enactment of laws in substantially the same form is to be construed as a continuation of the old law in the new form, and any rights existing under the old law, and any procedure commenced under the old law, will be protected under the new law; but it also follows that if the new law in cases such as this reserves from sale lands as to which initiatory or embryonic rights had been initiated under the old law, but no vested right had been acquired, the land is no longer subject to sale where it was intended that the later reservation should be retro-active or should apply to initiatory rights under the old law. By the repealing clause in the Act of 1870 the conclusion must follow that the reservation contained in Sec. 70 as amended applied to all proceedings under all laws, there being no saving clause. The amendment provided that all acts, and parts of acts, inconsistent with the provisions of this

act are hereby repealed. The act of 1868, being a re-enactment of the Act of 1863, they are to be deemed the same act in all respects that they are substantially the same. That portion of the Act of 1863 which authorized the sale of lands within two miles of a town or village if still in existence would at once have been repealed by the Act of 1870 because it is inconsistent with that act. On the other hand, the provisions of the Act of 1868 re-enacting the provisions of the law of 1863, which authorized the sale of such lands, were, of course, repealed, and likewise the provisions of Sec. 71 of the Act of 1868, in so far as it sought to preserve the mere preference rights of any purchaser under the Act of 1863 which had not become a vested right, were repealed to the extent that such lands were included within the reservation created by the Act of 1870, because any law, or part of a law, whether of 1863 or of 1868, which authorized the sale of such reserved lands was inconsistent with the provisions of Sec. 70 as amended; and this follows whether the law of 1863 be regarded as still existing for purposes of old applications, or was merged into the re-enacted law of 1868. In either event, the law of 1868 was in fact the law of 1863, with such changes as had been made.

This applies with equal force to the provisions of Sec. 3488 of the Political Code, though

through operation of the Act of 1870, amending Sec. 70 of the Act of 1868, the embryonic rights of Phineas Banning had been destroyed so that his old application of 1866 was not included by the saving clause contained in Sec. 18 of the Political Code.

As to the effect of re-enacting provisions in a law which is simultaneously repealed, see:
36 Cyc. 1084.

In *Bear Lake & R. Waterworks & I. Co. v. Garland*, 164 U. S. 1-11, 41 L. Ed. 327-332, this court said:

"Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the Act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. (2 Wall. 459) 808. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the

provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act." * * *

"The two acts in question here are of a similar nature, relating to the same general subject matter, and making provisions for the creation and enforcement of mechanics' liens. The new Act of 1890, although in terms repealing the earlier act, is yet in truth, and for the reasons already given, a continuation of that act with the modifications as provided in the new one."

In *Pacific M. S. S. Co. v. Joliffe*, 69 U. S. 450, 17 L. E. 805-807, this court said:

"The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them. The observations of Mr. Chief Justice Shaw, in *Wright v. Oakley*, 5 Met. 406, upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the state, may with propriety be applied to the case at bar.

"In construing the Revised Statutes and the connected Acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these Acts

which was never contemplated by the Legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the Revised Statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing Act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones.'"

As indicating that the Act of '63 or of '68 were regarded by the executive officers of the state as merged into the code provisions, we find that the subsequent proceedings under the Banning application, although it was originally filed in 1866, seem to have been taken under the Political Code.

The contest between Banning, McFadden and others was referred to the District Court under the provisions of Secs. 3414 and 3415 of the Political Code [Tr. fol. 196], thus indicating that the Act of 1863 was not regarded as still existing for the purposes of proceedings which had been commenced originally under that act, but the provisions of that act had become merged into, and continued as under,

the Act of '68, and then under the Political Code; and this simply emphasizes our contention that the reservation contained in the Act of 1870 and again in the Political Code, Sec. 3488, served to withdraw these lands from sale under any of the acts.

THE ADJUDICATION BY THE SUPERIOR COURT
ON THE CONTEST REFERRED TO IT BY THE
SURVEYOR GENERAL DOES NOT ESTOP THE
STATE.

The Plaintiffs in Error claim that even if it should be held that the lands in question were reserved and not authorized to be sold and though the patent would otherwise be void, yet inasmuch as a contest arose between two rival claimants and such contest was referred to the District Court for decision, that court had jurisdiction to determine and by the adjudication did determine all questions that might have been raised by the state if it had been a party, as to whether the land was reserved from sale, and all rights of the applicants as against the state to purchase it; and that the decision estops the state as fully as though it had been made a party and the matters involved in this case had been formally put in issue and formally decided against the contention of the state.

As said by the judge of the trial court:

“The suggestion that the state may be bound by a judgment in a case to which it is not a party makes a most unfavorable impression on the mind, for it is a cardinal principle of law that no judgment is binding upon one who has no opportunity to make a defense.”

The contest case referred to was under the following provisions of the Political Code, adopted March 12th, 1872:

“Sec. 3414 (Pol. Code)—When a contest arises concerning the approval of a survey or location before the surveyor general, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the courts of the state, he must make an order referring the contest to the District Court of the county in which the land is situated, and must enter such order in a record book in his office.

“Sec. 3415 (Pol. Code)—After such order is made either party may bring an action in the District Court of the county in which the land in question is situated to

determine the conflict, and the production of a certified copy of the entry, made by either the surveyor general or the register, gives the court full and complete jurisdiction to hear and determine the action.

"Sec. 3416 (Pol. Code)—Upon filing with the surveyor general or register, as the case may be, a copy of the final judgment of the court, that officer must approve the survey or location, or issue the certificate of purchase or other evidence of title in accordance with such judgment."

It will be noted that the Surveyor General is required to refer "the contest to the District Court," and after such order is made either party may bring an action in that court "to determine the conflict," and the court is given full and complete jurisdiction to hear and determine the action, but the action relates to the conflict or contest between the rival party claimants only.

It will be observed there are no provisions whatever for referring any question to the court, except in case of a contest. In other words, if the surveyor general should refuse to approve an application, or after approval and demand should refuse to issue a certificate of purchase, no matter upon what ground such refusal might be based, no reference could be made by that officer to any court to decide this question, but the applicant's remedy would be by mandamus. The court simply takes the

place of the officer to determine questions between the rival applicants, or between the applicant and the contestant, and the jurisdiction of the officer is suspended. The state is not a party in any way to the action, and no issues are framed which could conclude the state on a vital question, such as is presented here, as to whether the action of the land officials was unauthorized, or the lands themselves were reserved from sale. To hold that an adjudication between other parties could bind the state without a hearing, without representation, without issues, and without pleadings, is such an extreme proposition as to overturn all of our preconceived ideas as to the effect of judgments. The object of these provisions is made clear by the decisions.

In the early case of *Cunningham v. Crowley*, 51 Cal. 128, it was held that the state could not be made a party upon such a reference. The court said, p. 133:

“The purpose of the action is not to annul the certificate of location or purchase, or other evidence of title; but if both of the parties are applicants for the purchase of the lands, the purpose is to procure a determination of the question, as to which applicant has the better right to purchase them; or, if the contest has its origin in a protest, filed by a person who is not seeking to purchase the lands from the state, the purpose of the action is to determine

whether the party, against whom the protest is filed, has the right to purchase the lands; and the annulment of the certificate of purchase, or other evidence of title, is merely a consequence of the determination that the party holding it was not entitled as against the other party, to effect a purchase of the lands. In other words, the statute provides a mode by which, and the parties in whose name an action may be instituted to determine which party has the better right to purchase the lands, where there are contesting applicants, or to determine, in case of a mere protest, whether the party against whom the protest is filed, is entitled to make the purchase; and as the statute declares that either party to the contest may bring the action, there is no ground upon which the position that the state is a necessary party can be sustained."

In the case of *Lobree v. Mullen*, 70 Cal. 150, at page 153, the court said:

"The court, like the register, is an agent of the state, to whom is committed the power of determining whether the applicant has complied with the terms on which alone he is permitted to purchase the land."

In the case of *Youle v. Thomas*, 146 Cal. 537, a third person sought to intervene and the court held that it was not allowable. At page 541 the court said:

"The jurisdiction of the Superior Court in actions begun in pursuance to a reference to it of a contest arising in the sur-

veyor general's office over the right to purchase state lands is special and limited. It is derived solely from the provisions of the Political Code relating to such contests. The sole object to be achieved by the trial before the Superior Court is a determination of the question of the rights of the two parties between whom the contest arose in the surveyor general's office to purchase the particular tract of land in question. When the judgment of the Superior Court is given, the state has, by its legislative action embodied in the statute, declared that its officers are bound by the judgment of the court, and that the patent must issue to the particular one of the persons who made the original contest in the surveyor general's office adjudged to have the right. It is not a case where the court has before it a certain fund, or a certain piece of property, to determine what shall ultimately be done with it. In such a case the court having general jurisdiction in equity would be entitled to entertain the application of any person claiming a right thereto, and could give judgment awarding the property to any one who might be able to show his right. But in a question of the sort here involved there is no such general power. It is a mere method by which the state determines to whom it will sell its lands, and the parties concerned are the parties who have made the respective applications and whose rights have been referred to the court for adjudication."

And again on page 542, referring to sections 3415 and 3416, the court says:

"These provisions apply to school lands (Pol. Code, sec. 3495), and they clearly show that the state is merely referring a single question to the court for decision, and that there is no intention to authorize a general inquiry concerning the land, or the determination of rights under applications to purchase made after proceedings are begun upon the order of reference."

And again on page 543, referring to the jurisdiction of the court, and quoting from *Berry v. Cammet*, 44 Cal. 351, the court said:

"The sale of the lands of the state is committed to the executive department of the government; and the judicial department has no jurisdiction of controversies arising between applicants for the purchase of the lands, except in such matters as are expressly provided for by the statute."

In the late case of *Polk v. Sleeper*, 158 Cal. 632, the court said:

"The contest thus authorized (see section 3414) is one solely for the protection of some right of the party contesting."

And again,

"The only parties concerned in the action are the ones who properly became parties to the contest in the surveyor general's office and whose rights have been referred by that officer to the courts for adjudication."

And further the opinion says:

"The state is in no sense a party to the action."

As said by the learned trial judge, after quoting from section 1911, C. C. P., as to the effect of a judgment:

"Who would suspect that in a case referred by the surveyor general for the trial of a contest between two applicants for the purchase of public lands, a judgment in favor of the superior right of one of the applicants as against the other would preclude the state from claiming that no valid law exists authorizing the sale of the land in question, and that the acts of the state's officers in attempting to pass the title was *ultra vires*? The adjudication of such matters is no way included in or necessary to a determination of issues arising out of a contest referred by the surveyor general."

A number of cases from this court are cited by defendants in which are found general expressions apparently favorable to their contention. In none of these cases, however, was the state a party or represented in any way. Bearing in mind the object of the law, the expressions found in those decisions as to the effect of the judgment are easily understood, and do not in any way support defendants' position. When the state authorizes the land to be sold, and when an applicant has taken the preliminary steps, he is, so

long as the law remains unrepealed or so long as the particular land for which he has made application has not in some way been reserved from sale, entitled to complete his purchase upon full compliance with the law. It is also well settled that after he has made payment of part of the purchase price a contractual relation exists between him and the state, which confers upon him a vested right which cannot be taken from him. The state having provided for sale of its lands, it is indifferent as to who may be the purchaser, provided he complies with the requirements of the law; so when a contest arises between two applicants, the action of the state in referring the contest is as aptly described in some of the decisions, in the nature of an interpleader. In other words, where the state has provided for sale of the lands to anyone who fulfills the conditions imposed, it has no interest in the determination of the question as to which of two claimants has that right. Whoever had first complied with those conditions would take the land. Under such circumstances, the state having referred this question to the courts, it is clear that the decision of the courts is binding on the state to the same extent and no greater than would be the decision of the surveyor general if no reference had been made. In the one case the court, as the agent of the state,

has determined certain questions, and, on the other hand, the register or surveyor general, as the agent of the state, has determined the same or similar questions.

We quote again from the opinion of the lower court (p. 23):

"In contests arising before the surveyor general, and which he is permitted under the statute to decide, his decision is final and binding upon both parties, and his certificate of purchase is issued accordingly. In contests arising before the surveyor general, and which he is not permitted to decide, then the decision of the court becomes final, and certificate of purchase or patent is issued accordingly. In the latter case the court simply takes the place of the surveyor general—it is substituted for him for the purpose of determining the particular controversy. The court's judgment, in cases referred to it, is no more effective or binding than is the surveyor general's determination of issues which he is permitted to and does decide.

"It is the patent (when lawfully issued) that estops the state—not the decision of the surveyor general, nor the judgment of the court. The issuance of a patent to public lands sold pursuant to valid law is as binding as a deed of an individual. And it is immaterial whether the patent issued with or without a judgment of court. It is as binding in one case as in the other; but no more.

"The title cannot rise above its source. If there be no law permitting the sale of state lands of a certain character, no de-

cision of the surveyor general, nor of the court in actions to which the state is not a party, can make the patent effective to carry title."

Counsel on page 74 of their brief say that the function of the court in a contest case would be farcical and that the expressions contained in the cases cited by them nonsensical if their view is not correct as to the effect of the judgment, and add:

"The court cannot determine the general issue of priority or right without at the same time and necessarily determining the right of the prevailing party against the state."

Let us consider this question somewhat. The state authorizes the sale of its lands, except certain classes which are reserved. As to these reserved lands there is no law authorizing their sale, and any act by any officer of the state attempting to sell them or to issue a patent for them is *ultra vires* and void and can be attacked in any proceeding in any court. This is fundamental law on the subject of the power of the state or governmental officials.

Steel v. St. Louis, etc., Co., 106 U. S. 447-457:

Klauber v. Higgins, 117 Cal. 451-8.

The state in authorizing the sale of certain of its lands has created the office of surveyor general to act as its official agent in the sale

of those lands. Such agent has no power whatever with regard to lands which are reserved.

The state provides that when there are rival claimants for the same parcel of land which is authorized to be sold the surveyor general must determine as to which of these parties has the better right to purchase, and, further, whether either has complied with the law.

The state further provides that when certain questions arise, or at the request of either party, the contest must be referred to the court for trial, the court thereupon taking the place of the surveyor general in determining the questions which are presented by the contest, and becoming the official agent of the state for that purpose. Their functions are the same, though the jurisdiction of the court is broader within the limited scope of the determination of the questions involved in the contest.

The surveyor general is given no power to determine as against the state that lands which are reserved, or not authorized to be sold, can be sold, nor is the court given any such power. Neither the surveyor general nor the substituted agency, the court, has any jurisdiction whatever over the reserved lands. The only parties to the contest are the two applicants, or the applicant and the protestant, and the protestant must himself have some sort of interest as a settler or otherwise.

Now, what does the court determine in such action? It is given jurisdiction to determine the whole action, but the action is for the "determination of the conflict only." It determines the contest, and as the contest is not between the state and the applicants, or either thereof, but between the parties to the suit alone, the court determines nothing as against the state except that one of the parties has the better right as against the other to purchase the property in issue under the state laws authorizing their sale, and, if the law continues in force or the land is not reserved, it is the duty of the surveyor general to approve the application of the winning party. The court, in effect, determines the same ultimate question which the surveyor general would have been required to determine if the case had not been referred. It is true, the court having taken the place of the surveyor general, if it finds that neither party has complied with the law or is qualified to purchase, will so determine. The kernel of the matter is that the court, just as the surveyor general, determines questions arising within or under the act which authorizes the sale of the lands. Neither has any jurisdiction to determine any question outside of the act or with reference to lands not authorized to be sold. Even after the determination by the court that one of the applicants is qualified to purchase

and has complied with the law, there yet is no obligation whatever on the part of that party to proceed with the purchase, for, under the decisions, up to the time of payment it is optional with him to proceed or not.

Another perfect answer to the contention of plaintiffs in error is that the state is not a party, and there are not in such cases, and cannot be, any issues presented to the court between the state and the actual parties to the case as to whether or not the lands are authorized to be sold.

It is true that the decree requires the officers of the state to approve the application of the successful party, but the decree does not bind the state to permit the law to continue in force.

Counsel here fail to appreciate the difference between the effect of the judgment upon the state surveyor general, and its effect upon the state as the governing power, just as they fail to distinguish between the effect of an application as against the officer of the state and other applicants and its effect against the state itself, a distinction which is expressed by our Supreme Court in the case of *Hinckley v. Fowler*, 43 Cal. 56, which was a case in which a contest had been determined by the lower court under the Act of 1863. The court, speaking of the right of the applicant, said:

"The application of Fowler, thus made in accordance with law, gave him, as against the state, and, so long as the statute remained in force, a privilege to purchase the land he applied for. As against the officers of the state, and all applicants for the same land subsequent in point of time, it conferred upon him a *right* to purchase, which could only be lost by his own failure to pursue the further steps which the statute had prescribed."

THE STATE HAD POWER TO RETAKE LANDS COVERING THE SHORES AND A LARGE PART OF THE BED OF A NAVIGABLE BAY IN FRONT OF A SEAPORT, EVEN THOUGH SOME RIGHT IN THE LAND MAY HAVE BEEN THERETOFORE GRANTED BY THE STATE.

We pass now to another phase of this case, and one, in our opinion, of great importance.

As stated in the leading opinion of the court below [Tr. fol. 359],

"It is conceded that the San Pedro Bay is, and always has been, navigable waters of this state and of the United States."

Under the doctrine of the case of *Forrestier v. Johnson*, 164 Cal. 30, waters such as those covering practically the entire portion of Location 57 are navigable in fact, as they are waters which at high tide can be used for boating and fishing.

In 1866 when Mr. Banning filed his applica-

tion to purchase these lands Wilmington was the principal seaport of Southern California, and the greater portion of the overseas commerce of the southwest was carried on at this point. The Banning wharves at the foot of Canal street had been built for a number of years, and the Southern Pacific wharves adjoining had also been built.

The importance of Wilmington as a seaport continued until 1881, when the Southern Pacific Railroad Company extended its line across the bay to San Pedro, though after that some commerce continued to be carried on over the Banning wharves and the Southern Pacific wharves until they were destroyed.

The earliest figures showing the commerce carried on at the port were for 1871. During that year there was a total of 225 vessels incoming or outgoing from Wilmington, carrying over 30,000 tons of freight and nearly 11,000,000 feet of lumber.

The entire area of Wilmington or San Pedro Bay is something over 1,100 acres, and the lands underlying the bay were excepted from the Mexican grant known as the "Rancho San Pedro," and described in the patent as the lands covered by the navigable waters of Wilmington Bay. Of these lands at the time this series of cases was commenced over 1,000 acres were covered by the state tide land patents.

patents for about 1,000 acres of which were issued to various members of the Banning family, and more than 75 acres along the shores of San Pedro channel which connects the bay with the ocean had been granted to other parties, so that the entire bay, excepting the extension of the San Pedro channel up to the foot of Canal street in Wilmington, had been thus appropriated, or sought to be appropriated, to private uses. The location in suit, aside from the narrow strip of tide lands immediately in front of San Pedro, constituted by far the most important part of the bay, as it covered nearly half of the bay on the northerly shores, and almost the entire front of Wilmington. Its length was about two and one-half miles from east to west, and it extended nearly one mile into the bay in some places. It also covered extensive areas of land below low water, as shown by the map, Exhibit "B," hereto attached, being one of the maps issued by the War Department of the United States in 1859, the line of low tide being indicated on that map by the dotted line.

The United States has expended vast sums upon the improvement of the Inner and Outer Harbor of San Pedro, having thus expended up to the beginning of this action more than five million dollars, of which three million was spent upon the breakwater forming the Outer

Harbor, though before the breakwater was built the United States recognized the importance of the Inner Harbor or Bay of San Pedro.

De Guyer v. Banning, 167 U. S. 723,
42 L. E. 340.

That case involved the title of Mormon Island, which is situate in the bay, and the plaintiffs in the court below sought to attack the exception of the Inner Bay from the patent to the San Pedro Rancho, which was issued under an old Mexican grant.

The court said, on p. 723, L. E. 340:

"The case has been twice orally argued in this court, and we have, in addition, the benefit of a brief filed by leave of court, on behalf of the United State in support of the judgment below, the solicitor general having stated that the government has a deep interest in the result of the litigation by reason of the fact that it has heretofore expended vast sums of money in improving the navigation of the inner bay of San Pedro, and the entrance thereto; and that this bay is regarded as one of the most important points on the Pacific coast as a harbor of refuge."

In 1908 the United States established harbor lines in the Inner Bay of San Pedro, and these lines are shown upon Exhibit "A," hereto attached. These lines established the main turning basins and channels, but established very

few slips, that being left, as was shown by the report of the harbor board accompanying the proposed harbor lines, to future determination, and Col. Biddle, one of the members of that board, testified in this case that the proper way of developing the Inner Harbor was by construction of slips [Tr. fol. 307].

In 1909 Wilmington and San Pedro became consolidated with the city of Los Angeles, and the bay is now known as the Inner Harbor of Los Angeles, and all of the tide lands within the bay have been granted by the State to the city of Los Angeles upon the express condition that the same should be used solely for the purposes of the public trust upon which they were held by the state (Cal. Stats. 1911, pp. 1256-7), and the process of the development of the harbor is being continued by the city and the United States. It is a matter of common knowledge that the harbor has become one of vast importance to the commerce of the country.

That Phineas Banning recognized the importance of this tract of land in controlling the harbor and sought to obtain it for that purpose appears from the testimony [Tr. fol. 146], and it is the natural inference to be drawn from the conditions and circumstances surrounding the bay at that time.

The establishment of the harbor lines did not affect the status of these lands within or land-

ward of these lines in so far as the rights of the state and the people are concerned, they being still devoted to public use, and subject to the power and control of the state. See

Eldridge v. Cowell, 4 Cal. 80;

Guy v. Hermance, 5 Cal. 73;

People v. Williams, 64 Cal. 498-9;

People v. Kerber, 152 Cal. 736-7;

Montgomery v. Portland, 190 U. S. 29

The status of tide and submerged lands, and the character of the title by which they are held by the state, are too well established to require authority. The constitution of the state of California, adopted in 1879, in effect specifically recognizes the doctrine that the tide lands are held by the state by virtue of its sovereignty upon a public trust, and specifically devotes to public use lands of the character of those involved here, to-wit: tide and submerged lands fronting upon any navigable bay used for navigation within two miles of any incorporated city or town. It withheld all such lands from grant or sale except to municipal corporations, thus distinguishing and specifically setting apart lands of this character to the public uses of navigation and commerce.

This case really presents a state of facts similar to that presented in the Chicago case, 146 U. S. 387-476, where practically the entire har-

bor of Chicago had been granted by the state of Illinois to the Illinois Central Railroad, and subsequently the Granting Act had been repealed by the state of Illinois, and it was held by this court that the state had the power to retake the land. This court, after referring to the decisions relating to the location of a county seat, said:

“As counsel observe, if this is true doctrine as to the location of a county seat it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the Act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15,

1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."

The importance of this phase of the case is shown by the fact that counsel for plaintiffs in error have at all times urged with the utmost earnestness and zeal that the effect of the patent to Phineas Banning was to convey to him the entire title of the state, both public and private, in the lands involved, that it, in connection with the laws under which it was issued, constituted a declaration by the state that these lands were not required for public use, and that they became private lands subject only to the paramount jurisdiction of the United States. This contention has never been abandoned, and is still preserved on this appeal through the suggestion, which we find on page 20 of the Brief of Plaintiffs in Error, that this court, if the plaintiffs in error prevail, will simply reverse and remand the cause to the court below without undertaking to define the extent of plaintiffs' title in advance of a decision upon that question by the State Court, because they suggest that there is no adjudication by the court below upon the character or extent of the title which was acquired by plaintiffs' predecessor if the right to purchase was

vested before, and, therefore, unaffected by, the constitution of 1879.

In this connection counsel point out on page 19 of their brief that the conclusion which was reached by the State Court in some of the companion cases to this, and which involved patents under proceedings initiated since the adoption of the constitution of 1879, as to the nature of the title which would pass under a state patent to tide lands was not agreed to by all of the justices, and in case it should be held by this court that a vested right accrued to Mr. Banning by virtue of his application in 1866, which was affected by the subsequent act of the legislature of the state of California reserving such lands for sale, or by the constitution of 1879, which likewise withheld them from sale, the same contention will be advanced in the State Court again and insisted upon that inasmuch as the Act of 1863 authorized the sale of tide lands held by the state by virtue of her sovereignty without any reservation whatever the right acquired by virtue of the initiatory proceedings of Mr. Banning included the entire title, both public and private, of the state, subject only to the rights of the United States as the paramount authority.

For this reason we appeal to the doctrine established by this court in the Chicago case as being entirely applicable here, and urge that,

irrespective of all other reasons advanced herein, and even though it should be held by this court that some sort of right as against the state had become vested in Mr. Banning prior to the legislation or adoption of the constitution reserving the lands from sale, still the state had the power, either through its legislature, and most emphatically by its constitution, to withdraw the lands from sale; and inasmuch as nothing had been paid by Mr. Banning to the state prior to such withdrawals, and no improvements had been placed upon the land by Mr. Banning during the interim upon the faith of the application, no question arises as to whether any compensation should be paid Mr. Banning. His payment of the purchase price after the adoption of the constitution of 1879, or the building of railroad tracks in recent years across this strip by some of the plaintiffs in error, is immaterial.

For these various considerations the decision of the Supreme Court of the state of California should be affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES OF CALIFORNIA, 1863 (p. 593)

“Chap. CCCXCVII.—*An Act to provide for the Sale of certain Lands belonging to the State.*

“Section 1.—The Swamp, and Overflowed, Marsh and Tide Lands, belonging to the state, shall be sold at the rate of one dollar per acre, in gold or silver coin, payable: twenty per cent of principal within thirty days of the record of approval of survey or location, by the surveyor general, in the county surveyor's office; the balance, bearing interest at the rate of ten per cent per annum, payable annually in advance, computed from the date of such approval, shall be due and payable one year after the passage of any act requiring such payment, or before, if desired by the purchaser.

“Section 2.—The one hundred and fifty thousand acres of land granted to this state for the use of an agricultural college, by Act of Congress of July 2nd, eighteen hundred and sixty-two, the unsold portion of the five hundred thousand acres granted to the state for school purposes, the unsold portion of the seventy-two sections granted to the state for a seminary of learning, the unsold portion of the ten sections granted to the state for the erection of public buildings, and sixteenth and thirty-sixth sections granted for the use of the public schools, or lands in lieu thereof, shall be sold at the rate of one dollar and twenty-five cents per acre, payable in United States gold or silver coin, twenty per cent of the principal

and the first advance payment in interest on the balance to be paid within fifty days from the date of the record of approval of survey or location in the state locating agent's office, the balance, bearing interest at the rate of ten per cent per annum, payable yearly in advance, shall be due and payable, at the option of the purchaser, within one year after the passage of any act requiring such payment; *provided*, nothing in this act shall be construed to affect the sale of lands by the location of school land warrants, which lands shall be located and paid for in the manner now provided by law."

(Here follow certain provisions relating to disposition of funds which are not material.)

"Section 3.—Whenever any resident of this state desires to purchase any portion of the swamp and overflowed lands granted to the state by Act of Congress of September 28th, eighteen hundred and fifty, or any portion of the tide lands belonging to the state by virtue of her sovereignty, he shall make affidavit before any person competent to administer oaths, that he is a citizen of the United States, or has filed his intention of becoming a citizen, is a resident of the state, and of lawful age, that he desires to purchase said lands (describing them) under the laws of the state providing for the sale of swamp and overflowed and tide lands of the state, and that he has not entered under said laws any other land which, together with the land sought to be purchased, shall exceed six hundred and forty acres, and that he does not know of any legal or equitable

claim to said land other than his own, and also, if the applicant be a female, that she is entitled to purchase and hold real estate in her own name under the laws of this state, which application and affidavit shall be filed in the office of the surveyor of the county in which such lands, or the greater portion thereof, are situate.

“Section 4.—Whenever any resident of this state desires to purchase any portion of a sixteenth or thirty-sixth section of any township in this state, or any lands in lieu thereof, if the lands sought to be purchased have not been surveyed by authority of the United States, he shall file in the office of the county surveyor of the county in which said lands are situate, an application for a survey and plat and field notes of the lands sought to be purchased, which, when obtained, he shall file with the locating agent of the district, together with an affidavit that he is a citizen of the United States, or has filed his intentions to become a citizen, that he is of lawful age, and is a resident of the state, that the lands sought to be purchased are unoccupied except by the applicant, and that there are no improvements on said lands other than his own, and that to the best of his knowledge and belief there is no valid claim existing to said land adverse to his own, and if the applicant be a female, that she is entitled to purchase and hold real estate in her own name under the laws of this state; all of which shall be verified by the affidavit of three disinterested witnesses: *provided*, that the affidavits of applicants for the purchase of any of the lands granted to this state for the maintenance and support of an agri-

cultural and mechanical arts college, shall, in addition to the requirements of the affidavits above required, show that the lands sought to be purchased have been surveyed by the United States, and that the lands are subject to entry at private sale.

“Section 5.—Whenever a settlement is or has been made by occupation or improvement upon any portion of a sixteenth or thirty-sixth section of any of the public lands in this state, the locating agent of the district in which such land is situated shall, if such occupant has not acquired a pre-emption right to such land, notify such occupant or claimant of the fact that he is upon lands belonging to the state, and that he must make application to purchase the same of the state within sixty days, or forfeit all rights to the land. If such occupant or claimant shall neglect or refuse to make such application to purchase within the sixty days above named, such land shall be subject to location and sale in the manner provided for the sale of other sixteenth and thirty-sixth sections, with the exception that the affidavits in regard to occupancy and improvement may be omitted, in all of which cases the application to purchase shall be accompanied by the affidavit of the locating agent of the district, that he has duly notified the occupant or claimant of the land as provided by this section, and that for a period of sixty days after such notice the occupant or claimant has refused or neglected to apply for said lands.

“Section 6.—Whenever any resident of the state desires to purchase from the lands surveyed by authority of the United States any portion not less than the smallest legal

subdivision of the one hundred and fifty thousand acres granted to this state for the use of an agricultural college, any portion of the five hundred thousand acre grant, or of the seventy-two section grant, or the ten section grant, or of any sixteenth or thirty-sixth section, or lands in lieu thereof, he shall make the same affidavit as provided in section four of this Act, which shall be verified in the same manner; which affidavit, together with his application to purchase said lands, describing them by legal subdivisions, shall be filed in the office of the state locating agent of the district in which the lands sought to be purchased are situate.

“Section 7.—It shall be the duty of the county surveyor immediately upon receiving any application for a survey required by sections three and four of this Act, to note the same in a book kept in his office for the purpose, in the regular order, in which it is received, giving the name and address of the applicant, description of the land, class of land, whether swamp, tide, sixteenth and thirty-sixth section grant, or lands in lieu thereof, which book shall be furnished by the surveyor general, and shall always be open to public inspection. He shall, within thirty days after receiving such application, if the lands are subject to sale, complete the survey, plat and field notes, duplicates of which, together with a copy of the application and affidavits, shall, if the lands be swamp and overflowed, or tide lands, be forwarded to the surveyor general for approval; and if the lands be part of the sixteenth and thirty-sixth section grant, he shall furnish the applicant with a full description, by

legal subdivision, of the lands applied for, which, together with the application and affidavits required by section four of this Act, shall be filed with the locating agent of the district in which the lands are situate. The county surveyor shall, immediately upon the receipt from the surveyor general of any approved copy of survey of swamp or tide lands, forward the same to the *applicant*, and mark upon the maps and record in the books of his office all surveys thus made by him, which maps and books shall be always open to public inspection.

“Section 8.—It shall be the duty of the several state locating agents of this state, whenever application is made to them, as provided in sections five, six and seven of this Act, for the purchase of any lands of this state, except swamp and overflowed and tide lands, if the lands applied for be subject to sale, to keep a complete record of such applications, when accepted, in the same manner as provided for county surveyors in section seven of this act, which record shall always be open to public inspection. Whenever the amount of three hundred and twenty or more acres have been applied for under any one grant, he shall, in behalf of the state, make application to the register of the United States Land Office for the district, for such lands, in part satisfaction of the grant under which they are located, and obtain his acceptance of the selections, which acceptance, together with the corresponding certificates of location, according to the form prescribed by the surveyor general, he shall forward, with the proper affidavits, to the office of the surveyor general for approval,

and when approved and returned to him, he shall record the approval, and forward the approved certificate of location to the applicant.

“Section 9.—It shall be the duty of the surveyor general upon the receipt of any application to purchase any lands of the state, to carefully compare the same with the maps and records of surveys and locations in his office, and if the law under which such survey or location was made has been complied with, and no counter application or conflict exists, he shall, at the expiration of thirty days, approve the same, and forward a copy, with his approval endorsed thereon, to the county surveyor, if the lands be swamp and overflowed, and to the state locating agent, if for any other class of lands. The surveyor general shall keep at his office complete maps of the state, so far as surveys have been returned to him, upon which shall be shown all the lands sold by the state, and all surveys of land applied for, which have been approved by him, showing, also, all lands for which certificates of purchase or patents have been issued.

“Section 10.—Whenever any county surveyor shall neglect or refuse to make any survey of the state lands as provided by this act, the surveyor general may appoint some competent person to make such surveys, who shall have free access to the books and papers of the county surveyor's office.

“Section 11.—For the purpose of ascertaining, protecting and managing the title and claim of the state to any lands within its limits, derived by grants from the United States, or in any other manner, and

for the purpose of carrying out the laws which have been or may hereafter be enacted for the disposal of the same, an office shall be established at the seat of government, which shall be designated and known as the State Land Office of the State of California.

"Section 12.—The chief officer of said land office shall be designated and known as the 'Register of the State Land Office,' and his deputies shall be such as may be prescribed by law. The surveyor general shall be ex officio said Register until otherwise provided by law. (Here follow provisions as to qualifying.)

"Section 13.—It shall be the duty of the said register to keep separate and distinct accounts and records in relation to each class of lands to which the state may be entitled. He shall keep, in a well bound set of books, complete records of all lands that may have been or may hereafter be selected and located by the proper agents of the state as a portion of the five hundred thousand acres granted to the state, and applied to school purposes, of the seventy-two sections granted to the state for the purposes of a seminary of learning, of the ten sections granted to the state for the erection of public buildings, of the grant of the sixteenth and thirty-sixth sections, or lands in lieu thereof, and of the one hundred and fifty thousand acres granted to the state for the purposes of an agricultural college. These records shall show the number of the location, the date of the same, the name of the locator, the description of the land by township, range, section, and, when practicable, by the sub-

divisions of sections, the price per acre at which the same are sold, the amount paid, and date of first payment, the date of all subsequent payments, the number and date of the certificate of purchase, and the date of the patent, when the same shall have been issued. He shall also keep, in a well bound set of books, a complete record of all swamp and overflowed lands, and tide lands, to which the state is entitled by virtue of any Act of Congress, or by her own sovereignty, in the same manner as already prescribed in the case of school, seminary, public building, and agricultural college lands. He shall also keep the proper plats of the above named lands, upon which plats all approved locations and surveys shall be designated by their numbers; and when certificates of purchase or patents shall have been issued, the same shall be also noted on the plats. But so long as the surveyor general performs the duties of register, but one set of maps shall be required.

“Section 14.—Whenever any location or survey of any of the above mentioned lands has been approved by the surveyor general, in the manner hereinbefore specified, the purchaser shall present his copy of the same to the county treasurer, who shall thereupon receive the amount, whether in full or in part, so provided by law, and the fee for the certificate of purchase, indorsing his receipt therefor upon the back of the said certificate of location or survey, which shall then be returned to the purchaser. All subsequent payments, whether of the balance of the principal or of the interest thereon, shall be

paid to the county treasurer in like manner, who shall indorse the same upon the back of the certificate of purchase. The treasurer shall also direct the purchaser to take the said certificate of location or purchase or survey so indorsed to the auditor, who shall charge the amount named therein to the account of the treasurer, and make his check upon the indorsed receipt so charged."

Sections 15 and 16 related to the duties of the county treasurer with reference to payments received by him.

"Section 17.—When a certificate of purchase has been issued by the register, the same shall be deemed *prima facie* evidence of legal title to the land for which the certificate of purchase is issued; *provided*, such certificate of purchase shall not be so construed as to affect the working of mineral lands for mining purposes. Such certificates, and all rights acquired thereby, shall be subject to sale and transfer, by deed or assignment, executed and acknowledged before any officer authorized by law to take acknowledgments of deeds, or before said register; but all such sales or transfers shall, when recorded by the county recorder, be reported by him to the register, to be entered in the books of his office, and the said recorder shall be entitled to receive from the purchaser or transferee, for so reporting the same, a fee of fifty cents in addition to that already allowed for recording.

"Section 18.—Whenever a purchaser of any state land upon a credit desires to abandon the location or entry made by him,

he shall do so by acknowledgment and reconveyance of his title to the state, and shall surrender the certificate of purchase, or if the same has been lost, send to the register an affidavit of the fact. * * *

Section 19 made provision for the issuance of a certificate by the register of the state land office of the amount paid upon any lands which should prove to be within the boundaries of a grant, or otherwise not the property of the state. This certificate could be used in locating other lands.

“Section 20.—Whenever hereafter the purchaser of any of the public lands which have been sold on a credit, or the owner of or assignee of the certificate of purchase shall fail or neglect to pay the interest within thirty days after the same shall have become due, in accordance with the provisions of the Act under which the purchase was made, it shall be the duty of the register of the state land office to publish a list of the lands upon which default has been so made by causing the same to be printed three or more times in some weekly newspaper published in the county in which the lands are situated, or in case there is no newspaper published in the county, by posting the same upon the doors of the county court house during the period of thirty days, together with a notice that if the sum due upon each is not paid to the county treasurer within ten days after the last day of publication, the certificate of purchase may be annulled, as now provided for by law, and the land

held subject to be re-entered by other parties, as though the same had never been taken up.

"Section 21.—A second certificate of purchase shall not in any case be issued of the same tract of land, unless the first certificate shall have been surrendered, or shall have been annulled in the manner prescribed by law. * * *"

Section 22 provided for the issuance of a patent upon full payment.

Sections 23, 24 and 25 provided for the seal of office of the register, the salary and fees to be received by him, and gave power to the surveyor general, the county surveyor and agents to administer oaths.

Section 26 provided for issuance of a duplicate school land warrant.

"Section 27.— * * * In all cases where a contest shall arise for the approval of a survey or location before the surveyor general, or for a certificate of purchase, or other evidence of title, before the register, that officer shall, when such contest is a question as to the survey, or purely a question of fact, determine the same according to the facts, and give his approval, or issue the certificate of purchase, or other evidence of title, as he may so determine. When, in the judgment of the surveyor general or register, a question of law alone, or of law and fact, is involved in such case, or when either party shall demand a trial of such question in the courts of this

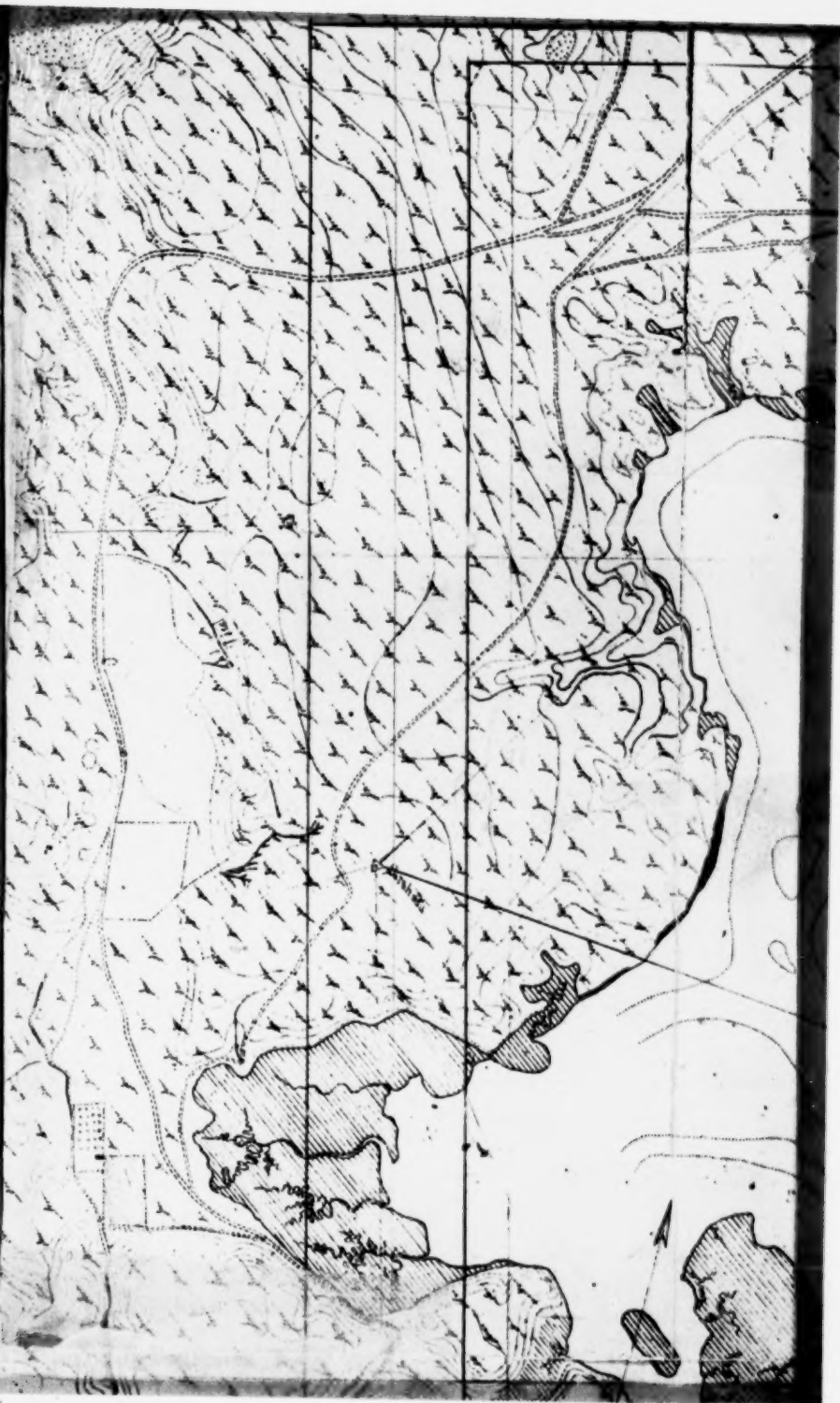
state, the said surveyor general or register shall enter such demand, with a statement of the case, together with a direction that the parties are referred to the District Court of the proper district for a final determination of such conflicting claim or contest, in the proper record book of his office. Either party may bring his action in the District Court of the county in which the land in question is situated, to determine such conflicting claim; and the proffer of a certified copy of the entry, made by the surveyor general or register, shall give to said District Court full and complete jurisdiction to hear, try, and determine said conflicting claims. Upon the filing with the surveyor general or register a copy of the final judgment of said District Court, the officer shall give his approval, or issue the certificate of purchase, or other evidence of title, in accordance with such judgment. * * *

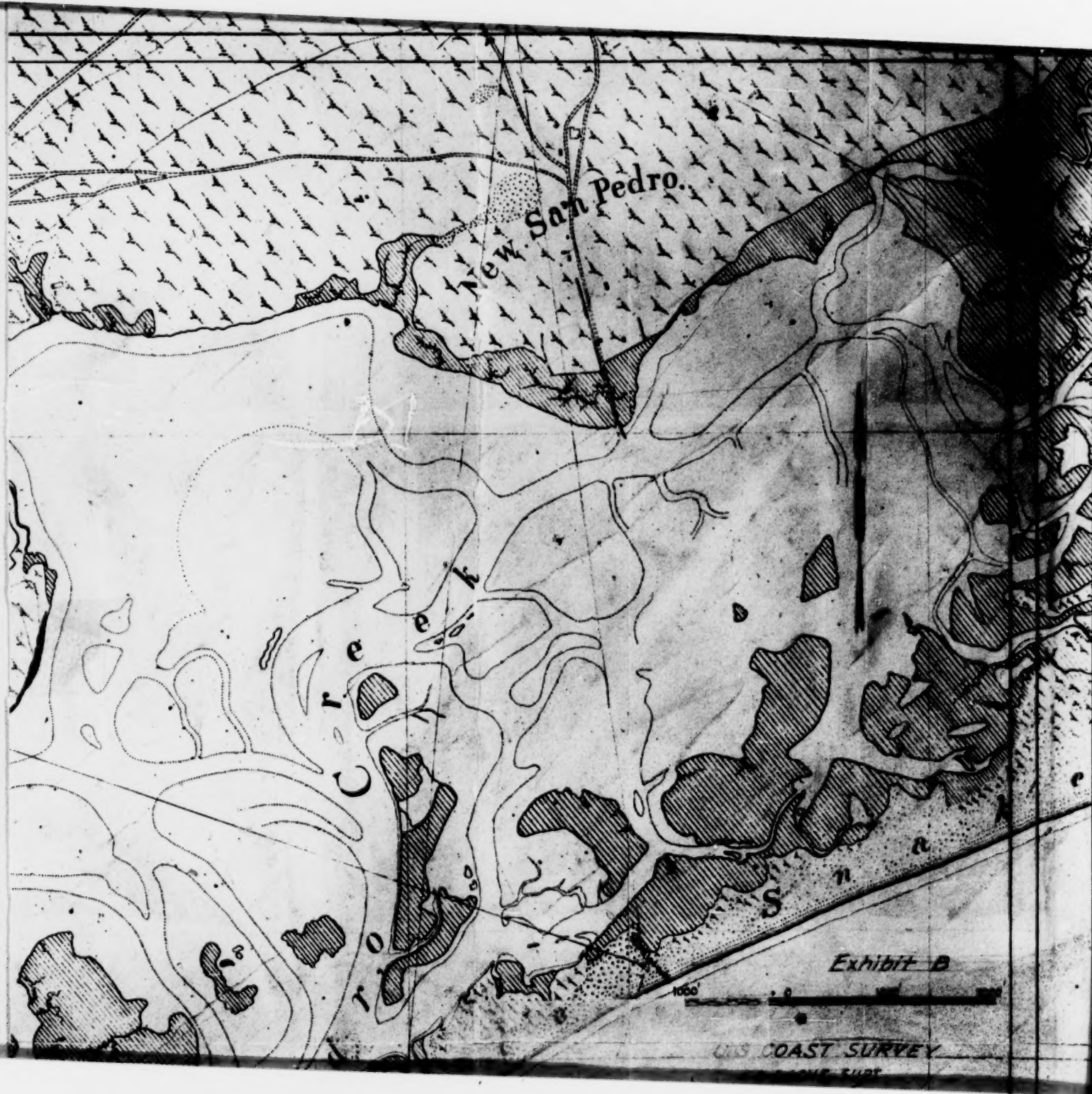
Section 28 provided that no location of land or any of the proceedings under the Act shall be construed to give any title or interest in any of the public lands unless an oath be taken, which was prescribed in this section.

Section 29 required the oath to be endorsed on a description of the land, and to be filed with the county recorder, and provided "The right of the person making the oath or affirmation shall not be deemed to attach to such land by virtue of any proceedings under this Act until the moment of the filing of the description and certificate of the oath or affirmation in the

office of the county recorder, and no certificate of purchase or patent shall be issued to any person for lands located under this Act until a certified copy of said description and oath or affirmation shall have been filed in the office of the state register."

"Section 30.—This Act shall not apply to the marsh and tide lands upon the city front and within five miles of the city of and county of San Francisco, and of the city of Oakland, and one mile of the state prison at San Quentin."





**BANNING COMPANY *v.* PEOPLE OF THE STATE
OF CALIFORNIA UPON THE INFORMATION OF
WEBB, ATTORNEY GENERAL.**

**ERROR TO THE SUPREME COURT OF THE STATE OF
CALIFORNIA.**

No. 73. Argued January 19, 1916.—Decided February 21, 1916.

The withdrawal from sale of lands by a State before any right is consummated, does not amount to the impairment of the obligation of a contract within the meaning of Article I, § 10 of the Federal Constitution.

While an offer made by a State, though no particular person be designated, and accepted, may constitute a contract protected by the Federal Constitution, the offer and acceptance must have the characteristics of a bargain and be conventional counterparts.

Where a State makes a general offer to sell and provides for contest and determination of conflicting claims of parties contending for the right to purchase, the State is not bound by its offer or precluded from withdrawing it, until the rightful claimant is determined and his right of purchase perfected by payment of at least an installment of the price thereof.

Expenditures, other than payment to the State, by one intending to accept a general offer of a State to sell public lands are but voluntary

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qualifications to become a purchaser and are not binding on him to proceed to purchase or on the State to wait for him to purchase.

Although the statute of California of 1863 gave private parties the right to acquire tide lands under certain conditions, the right was abrogated by later statutes and the constitution of 1879, and such abrogation was not unconstitutional under the contract clause of the Constitution as to one who had not paid any part of the purchase price prior thereto.

169 California, 542, affirmed.

THE facts, which involve the constitutionality under the contract clause of the Federal Constitution of legislation of California and provisions of the constitution of 1879 withdrawing state lands from sale, are stated in the opinion.

Mr. James A. Gibson, with whom *Mr. Edward E. Bacon* was on the brief, for plaintiffs in error:

The proceedings for purchase taken by Phineas Banning in 1866, under the act of 1863, created a contract with the State of California for the purchase of the land in accordance with that act, which could not be impaired by any subsequent legislative action.

The State's offer to sell was accepted by filing application to purchase and this consummated a binding contract.

The decisions relied on under preëmption laws can be distinguished, and do not involve doctrine of contract by offer and acceptance.

Sufficient consideration for State's contract is found in expenditures on the faith of the offer, and implied promise by the applicant to pay the purchase price.

Prior decisions of the California court are not binding on this court, nor even persuasive as authority.

The contract by offer and acceptance has been sustained by numerous decisions under the contract clause of the Federal Constitution.

The judgment rendered by the District Court in the

contest proceedings in 1879 conclusively established the contract right of Phineas Banning to purchase the land in suit and that right constituted property of which he could not be deprived by subsequent legislation without violating both the contract clause and the due process clause of the Federal Constitution.

None of the legislation intermediate the act of 1863 and the constitution of 1879 should be construed as affecting the rights of an applicant under the former act to complete his proceedings for purchase in accordance therewith.

In support of these contentions, see *Am. Exp. Co. v. Mullins*, 212 U. S. 311; *Blair v. Chicago*, 201 U. S. 400; *Water Co. v. Boise City*, 230 U. S. 84; *Campbell v. Wade*, 132 U. S. 34; *Frisbie v. Whitney*, 9 Wall. 187; *Grand Trunk Ry. v. South Bend*, 227 U. S. 544; *Hall v. Wisconsin*, 103 U. S. 5; *Hendrick v. Lindsay*, 93 U. S. 143; *Louisiana R. R. v. Behrman*, 235 U. S. 164; *Louisville v. Cumberland Tel. Co.*, 224 U. S. 649; *McCullough v. Virginia*, 172 U. S. 102; *New York Elec. Co. v. Empire City Co.*, 235 U. S. 179; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Co. v. Rivers*, 115 U. S. 674; *Nor. Pac. R. R. v. DeLacey*, 174 U. S. 622; *Owensboro v. Cumberland Tel. Co.*, 230 U. S. 58; *Pennoyer v. McConnaughy*, 140 U. S. 1; *Russell v. Sebastian*, 233 U. S. 195; *Tarpey v. Madsen*, 178 U. S. 215; *Telfener v. Russ*, 145 U. S. 522; *United States v. Klein*, 13 Wall. 128; *U. S. Fidelity Co. v. United States*, 209 U. S. 306; *Walla Walla v. Water Co.*, 172 U. S. 1; *Yosemite Valley Case*, 15 Wall. 77; *McConnaughy v. Pennoyer*, 43 Fed. Rep. 196; *Anthony v. Jillson*, 83 California, 296; *Buckley v. Howe*, 86 California, 596; *Cadierque v. Duran*, 49 California, 356; *Christman v. Brainerd*, 51 California, 534; *Cunningham v. Shanklin*, 60 California, 118; *Cushing v. Keslar*, 68 California, 473; *Dillon v. Saloude*, 68 California, 267; *Garfield v. Wilson*, 74 California, 175; *Goldberg v. Thompson*, 96 California,

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117; *Hinckley v. Fowler*, 43 California, 56; *Lobree v. Mullan*, 70 California, 150; *McFaul v. Pfankuch*, 98 California, 400; *Perri v. Beaumont*, 91 California, 30; *Tyler v. Houghton*, 25 California, 27; *Wright v. Langenour*, 55 California, 280; *Youle v. Thomas*, 146 California, 537.

Mr. Albert Lee Stephens and *Mr. J. A. Anderson*, with whom *Mr. U. S. Webb*, Attorney General of the State of California, and *Mr. W. H. Anderson* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit brought by the State of California to quiet title to certain lands embraced in a patent issued under certain statutes of the State authorizing the sale of tide lands.

The lands involved constituted location No. 57 on the state tide lands, and the State alleged that they had been at all times a portion of the inner bay of San Pedro and below the line of ordinary high tide; that they were partly within the limits of the City of San Pedro and partly within the limits of Wilmington; that prior to and since 1870 no portion of them had ever been reclaimable for agricultural or other purposes and that the State had at all times withheld them from sale.

The intermediate pleadings we may omit. The defendants (plaintiffs in error here) filed separate answers, the pertinent parts of which may be summarized as follows: They denied the title of the State, the location of the lands as alleged or their relation to the cities of San Pedro and Wilmington, or that they were not susceptible of reclamation for agricultural purposes or that they had been withheld from sale by the State.

For an affirmative defense it was alleged that one Phineas Banning, in February, 1866, made application to the

State under an act of its legislature for the disposition of state lands to purchase the lands in controversy; that he possessed the qualifications to apply to purchase the lands and on February 15, 1866, did apply to purchase them under an act of the legislature providing for their sale approved April 27, 1863, and in conformity to his application and the provisions of § 7 of that act caused a survey of the lands to be made and a plat and field notes thereof to be completed by the county surveyor of Los Angeles County and paid a large sum of money to such surveyor April 2, 1866, for legal fees; that he caused a copy of his application and affidavit to be filed in the office of the surveyor general of the State February 15, 1866; that on said date he subscribed the oath required by § 28 of the act of 1863 and complied with § 29; that by reason of such proceedings he acquired the title to the lands and a contract was created between him and the State whereby the State agreed to sell him the lands upon the terms provided in the act of 1863. That he complied with all other provisions of the act and of other acts, and that a patent was duly issued to him and the title thereby conveyed to him and by him conveyed to defendants. That the State by this action is attempting to impair the obligation of the contract between the State and Banning in violation of Article I, § 10, of the Constitution of the United States.

That subsequently other applications were made to purchase other lands in the vicinity of location No. 57 which overlapped and conflicted with that made by Banning; that one of said applicants, to-wit, one William McFadden, made a demand upon the surveyor general of the State that in pursuance of § 3413 of the Political Code of the State the contest between the applicants be referred to the proper court for judicial determination of the question as to which of the applicants was entitled to a patent from the State. That in accordance with

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the requests the surveyor general referred the contest to the District Court of the Seventeenth Judicial District of the State in and for the County of Los Angeles and in pursuance thereof McFadden commenced an action against Banning and certain other parties and it was therein adjudged that Banning was entitled to purchase and to have a patent issued to him and that Banning was entitled to the approval of his survey and application as to all of the lands described in his amendatory application of January 2, 1878, except a certain described tract, and was entitled to comply with the further provisions of the law to purchase and receive a patent therefor.

That Banning, on April 5, 1880, paid the first installment on the purchase price of the land, and, on April 10, 1880, a certificate of purchase was issued to him whereby it was certified that he had in all respects complied with the law and was entitled to receive a patent; that subsequently, on December 14, 1881, another certificate was issued certifying that full payment had been made to the State and that the decree of the court in the contest proceedings had been fully complied with and that he was entitled to a patent, and thereafter on December 16, 1881, a patent was duly issued in accordance with the certificate and the decree of the District Court and duly recorded in the office of the recorder of Los Angeles County.

That the defendants have succeeded to the rights of Banning and have become vested with a fee simple title to the lands paramount to the claim of the State or of any person; that the State is estopped by the judgment of the District Court and the proceedings from claiming any right, title or interest in them or any of them and that the patent and proceedings are a bar to the claim of the State or of any one.

As a third defense §§ 312, 315, 316, 317, 318 and 319

of the Code of Procedure of the State were pleaded as a bar to the action.

The trial court found to be true the allegations of the State as to the character of the lands, their location within the inner harbor of San Pedro, and that, since 1870, they have been within two miles of the city of San Pedro and Wilmington, being partly within the limits of those cities.

The court also found the fact of the application of Banning as alleged, the conflict with McFadden, its reference to the District Court for decision, the decision and judgment rendered and the subsequent proceedings had, the payment of the purchase price of the lands and the issue of patent to Banning. It further found that the patent was void, that no title vested thereby to any land below ordinary high tide, that the State was not estopped by the judgment or the subsequent proceedings and that they did not bar the claims of the State, nor constitute an adjudication of the matters in controversy against the State or debar it from prosecuting this action. The court also decided against the bar of the sections of the Code of Procedure.

From these findings the court concluded and decreed that the State was the owner of the lands and that the defendants had not nor had either of them any estate or title in them. A motion for new trial was made and denied and on appeal the Supreme Court affirmed the judgment and order denying the new trial.

There is no dispute about the facts. Banning complied with the act of 1863 and subsequent acts concerning the sale of the lands and acquired title if they had the efficacy to convey it or were not suspended in their operation by subsequent legislation and by the constitution of the State adopted in 1879.¹ The Supreme Court denied in

¹ "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right

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some respects such efficacy and decided that all of the right of Banning to acquire title to the lands was taken away by the constitution of 1879, and the legislation to which we shall presently refer.

We need not encumber the opinion with a detail of the statutes. It is conceded and the Supreme Court has decided that title could be acquired to the tide lands of the State under the act of 1863, and it is conceded that Banning proceeded regularly under that statute and acquired the title if other statutes or the constitution of 1879 did not intervene to prevent. It is upon the efficacy of the later statutes and the constitution that the questions in the case depend.

The specific contention of plaintiffs in error is that by the application to purchase the lands under the act of 1863, the expenditure of money in accordance with its provisions for a survey of the lands, the statute of 1868 and the Political Code, and the judgment in the McFadden contest, a contract between Banning and the State was made which the constitution of 1879 or subsequent statutes could not impair.

The opposing contention is that no inviolable right of purchase vested in Banning or contract occurred until the payment by him of the purchase price of the lands and that such payment was after the adoption of the constitution and legislation withdrawing the lands from sale. **In other words**, that the lands were withdrawn from sale before any right became consummated.

of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof." Article XV, § 2, p. 37.

The constitution of the State has special relevancy in regard to contentions not before us. We refer to and insert it only for the sake of completeness, it being referred to throughout the argument.

Some dates are necessary to be given: Banning's application was made in February, 1866. It was allowed to repose without attention until the contest initiated by McFadden in April, 1878, on account of McFadden's application that overlapped and conflicted with Banning's. Judgment was entered in this contest November 26, 1879. This judgment decided Banning's to be the prior right. He made a first payment on the lands March 5, 1880. The certificate was issued April 10, 1880, and a patent executed December 16, 1881. The constitution was adopted in 1879, as we have seen. And further, in 1872, the town of Wilmington was incorporated, and the Supreme Court held that by an act passed April 4, 1870, all lands within two miles of "any town or village" (Statutes of 1869-70, § 877) were excluded from sale. This provision was repeated in the Political Code of 1872, § 3488, p. 532. The act of incorporation of Wilmington was repealed in 1887 (Stats. 1887, 108, 109) but the court said, "If in point of law Wilmington was an incorporated town during the interval between the passage and repeal of the law, then all proceedings to purchase the lands in question taken in that interval would be invalid with respect to land within the two-mile limit." This being the law, and the lands lying within two miles of the limits of Wilmington as incorporated by the act of 1872, the court said, "the patent is void and all claims of any of the defendants thereunder are invalid."

We accept this construction of the act incorporating Wilmington and the effect of the act of April 4, 1870, and of § 3488 of the Political Code and the exclusion thereby of tide lands within two miles of Wilmington from sale; and we are brought to the short point of the effect of the application and proceedings under it by the payment of the first installment of the purchase price of the lands and the other acts relied on, whether they consummated

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a contract between the State and Banning protected by the Constitution of the United States.

To support such conclusion plaintiffs in error cite *McConaughy v. Pennoyer*, 43 Fed. Rep. 196, in which Judge Deady expressed the view of an Oregon statute which offered the lands of that State for sale that such an application was "a written acceptance of the offer of the State, in relation to the land of the State described therein," and they cite the same case in this court (140 U. S. 1, 18), where that view was pronounced forcible and might have been conclusive but for the opposing consideration that suggested itself that the bare application itself unaccompanied by the payment of any consideration partook of the nature of a preëmption claim under the laws of the United States, with reference to which it had been held that the occupancy and improvement of the land by the settler and the filing of the declaratory statement of such fact conferred no vested right as against the Government of the United States until all of the preliminary steps prescribed by law, including the payment of the price, were complied with. *Yosemite Valley Case*, 15 Wall. 77, and *Frisbie v. Whitney*, 9 Wall. 187, were cited. The court found it unnecessary to determine between those views.

The cited cases were approved in *Campbell v. Wade*, 132 U. S. 34, 37, 38, and their principle applied to statutes of the State of Texas, one offering land for sale and the other withdrawing it before the performance of the conditions which gave a right of purchase. These conditions were an application to the surveyor of the county in which the land was situated to survey the land and within sixty days after survey to file it in the General Land Office. Within sixty days after such filing, it was provided by the statute, it should be the right of the applicant to pay the purchase money and upon doing so to receive patent for the land. "But for this declaration of the act," this

court said, by Mr. Justice Field (p. 37) "we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the State."

Considering the same statute in *Telfener v. Russ*, 145 U. S. 522, 532, it was said that the right was "designated in the decision of the Supreme Court of the State as a vested right that could not be defeated by subsequent legislation."

Plaintiffs in error cite *Nor. Pac. Ry. v. DeLacy*, 174 U. S. 622, as in some way modifying the doctrine of the *Yosemite Valley Case* and of *Frisbie v. Whitney*. That case involved the question whether a claim of preëmption had under the circumstances stated in the case so far attached to the land in controversy that it did not pass under a grant to the railroad company as land to which the United States had "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights." It was held to have so passed; in other words, that the claim had not attached to the land, DeLacy not having performed the conditions of its preëmption. The case has no value in the solution of the questions presented by the case at bar. Nor have the other cases cited by plaintiffs in error for the proposition that an offer made by a State, though no particular person be designated, and accepted, constitutes a contract which will be protected by the Federal Constitution. The proposition in its generality may be admitted. Its illustration and application in the cited cases it would protract this opinion unnecessarily to detail. It is enough to say that the cases are not apposite. The offer and acceptance must have the characteristics of a bargain, must be conventional counterparts, as in the cited cases, and of which we may say generally franchises were offered on one part and accepted on the other by the undertaking of works costly to construct and costly to maintain and from which the public derived great benefit.

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But even in such case it was pointed out in *Wisconsin & Michigan Ry. v. Powers*, 191 U. S. 379, 386, that the offer of a State does not necessarily imply a contract. It may be of encouragement merely, "holding out a hope but not amounting to a covenant." The offer of the State was an exemption from taxation, and the asserted acceptance of the offer which was said to consummate a contract was the building of a railroad, and it was observed that the "building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." The "offer" and "acceptance" we held not to constitute a contract. This comment is applicable to the case at bar, and the Supreme Court of the State has decided, as we shall presently see, that the filing of the application does not constitute a binding contract upon the part of the applicant and the State.

But plaintiffs in error say that this court is not bound, against the invocation of the contract clause of the Constitution of the United States, by the decision of the Supreme Court of the State of California as to the construction and effect of the act of 1863 and subsequent legislation supplementing its provisions. *Louisiana R. & N. Co. v. New Orleans*, 235 U. S. 164; *New York Electric Lines v. Empire City Co.*, 235 U. S. 179. And they insist that the language of the act explicitly offered the lands for sale, which offer was accepted by Banning through his application, the oath taken by him and the expendi-

tures made by him, and that this construction has supporting strength from the judicial contest authorized by the act and that the judgment rendered in such contest was effective not only against the losing contestant but against the State as well.

If we apply the analogy of the preëmption laws we shall have to reject immediately the contention based on the proceedings aside from the judgment rendered upon a conflict of applications, and against the asserted effect of such judgment we have also the analogy of a conflict of claims under the mining laws of the United States. In other words, the State made an offer to sell, which might have been perfected into an inviolable right, and provided for a contest of conflicting claims, not as against itself, but as to the rights of the contending parties. The rightful claimant being determined and his right of purchase perfected, the State is then bound by its offer and is then and not until then precluded from legislation withdrawing it. And the right of purchase is perfected only by the payment of some installment of the purchase price of the land. It is only then that the State has received anything of value from the applicant. What he has done prior, the expenditures he has made, are but the qualifications to become a purchaser, not binding him to proceed, nor binding the State to wait for that which may never be done before it determines on other uses or disposition of the lands. And to wait might mean serious embarrassment. We have seen in the case at bar that Banning applied first in 1866. His application was permitted to repose in the files of the county or state officers until 1878, when activity upon it was provoked by another application.

Plaintiffs in error have been unable to cite a single decision in sanction of their contention. The Supreme Court refers to one (*Hinckley v. Fowler*, 43 California, 56, 63), decided in 1872, as possibly being urged to support it.

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If we may venture to express our understanding of that case we should say that it is seriously disputable if it so decides. However, the court said that the case, so far as it announced such view, that is, "so far as it announces the rule that the filing of the application creates a contract binding on the state before any part of the price is paid, must be considered as overruled by the later decisions." *Messenger v. Kingsbury*, 158 California, 611, 615, and cases cited. Also *Polk v. Sleeper*, 158 California, 632. And these cases have become rules of property and factors in decision—indeed, would determine it, even if we had doubt of the construction of the applicable statutes, under the ruling of *Burgess v. Seligman*, 107 U. S. 20, and many subsequent cases.

A somewhat confused contention is made that by the act of March 28, 1868, and under the Political Code the rights of plaintiffs in error were preserved, and yet it seems to be contended that, though both act and code contain a provision excluding from their operation tide lands within two miles of any town or village, such provision is not applicable to lands theretofore applied for. The contentions we may suppose were rejected by the Supreme Court. And plaintiffs in error say that a decision either way cannot affect their "prior contention, that a binding contract of sale was created by the acceptance of the State's offer, through the filing in 1866 of the application to purchase under the act of 1863." Further discussion of the contentions is therefore unnecessary. Nor is further discussion of the effect of the judgment in the contest proceedings necessary. If by the incorporation of Wilmington in 1872 the act of April, 1870, and the Political Code of 1872 which excluded all tide lands within two miles of Wilmington became effective, the lands were withdrawn from sale and plaintiffs in error could have acquired no rights by proceedings subsequent to such incorporation. This, we have seen, was the judgment of

the Supreme Court of the State. The court had decided in prior cases that the State was not a party to the contest (*Cunningham v. Crowley*, 51 California, 128, 133); that the contest decided only the rights of the opposing parties (*Berry v. Cammet*, 44 California, 347; *Polk v. Sleeper*, *supra*).

The judgment undoubtedly is conclusive between the parties, determines their rights, as between themselves, and establishes the privilege to purchase the lands acquired by the prior application, even against the State "so long as the statute remained in force," to use the language of *Hinckley v. Fowler*, *supra*. This explanation may be given of all the cases cited by plaintiffs in error upon the effect of the judgment.¹ As long as the statute existed, rights could be acquired under it. Upon its repeal or limitation such opportunity was taken away.

Judgment affirmed.
